No. 15-108

Title:	Commonwealth of Puerto Rico, Petitioner
	v.
	Luis M. Sanchez Valle, et al.
Docketed:	July 23, 2015
Linked with 14A1236	
Lower Ct.:	Supreme Court of Puerto Rico
Case Nos.:	(CC-2013-0068, CC-2013-0072)
Decision Date:	March 20, 2015

Questions Presented

—Date—	——Proceedings and Orders————————
Jun 5 2015	Application (14A1236) to extend the time to file a petition for a writ of certiorari from June 18, 2015 to July 20, 2015, submitted to Justice Breyer.
Jun 5 2015	Application (14A1236) granted by Justice Breyer extending the time to file until July 20, 2015.
Jul 17 2015	Petition for a writ of certiorari filed. (Response due August 24, 2015)
Aug 24 2015	Brief of respondents Luis M. Sanchez Valle, et al. in opposition filed.
Sep 8 2015	Reply of petitioner Commonwealth of Puerto Rico filed.
Sep 9 2015	DISTRIBUTED for Conference of September 28, 2015.
Oct 1 2015	Petition GRANTED.
Oct 19 2015	Consent to the filing of amicus curiae briefs in support of either party or of neither party received from counsel for the petitioner.
Oct 20 2015	Consent to the filing of amicus curiae briefs in support of either party or of neither party received from counsel for the respondents.
Nov 16 2015	Joint appendix filed. (Corrected Joint Appendix filed and distributed on 1/31/16.) (Statement of costs filed)
Nov 16 2015	Brief of petitioner Commonwealth of Puerto Rico filed.
Nov 24 2015	SET FOR ARGUMENT on Wednesday, January 13, 2016
Dec 4 2015	Record requested from the Supreme Court of Puerto Rico.
Dec 15 2015	CIRCULATED.
Dec 15 2015	Record received from the Supreme Court of Puerto Rico. 1 Box.
Dec 16 2015	Brief of respondents Luis M. Sanchez Valle, and James Gomez Vazquez filed. (Distributed)
Dec 22 2015	Brief amici curiae of Professors Christina Duffy Ponsa and Sam Erman filed. (Distributed)
Dec 22 2015	Brief amicus curiae of Virgin Islands Bar Association filed.
Dec 23 2015	Brief amici curiae of Current and Former Senior Puerto Rico Officials filed. (Distributed)
Dec 23 2015	Brief amicus curiae of United States filed. (Distributed)
Dec 23 2015	Brief amici curiae of Colegio de Abogados y Abogadas de Puerto Rico, and The Puerto Rican Bar Association filed. (Distributed)
Dec 23 2015	Motion of the Solicitor General for leave to participate in oral argument as

	amicus curiae and for divided argument filed.
Dec 23 2015	Brief amicus curiae of Florida Association of Criminal Defense Lawyers - Miami Chapter filed. (Distributed)
Jan 5 2016	Reply of petitioner Commonwealth of Puerto Rico filed. (Distributed)
Jan 8 2016	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Jan 8 2016	Letter from Clerk of Court advising that counsel should be prepared to discuss at oral argument whether this Court has jurisdiction to review the ruling of the Supreme Court of Puerto Rico under 28 U.S.C. Sec.1258.
Jan 11 2016	Supplemental brief of petitioner Commonwealth of Puerto Rico filed. (Distributed)
Jan 12 2016	Letter from counsel for the respondent received.
Jan 13 2016	Argued. For petitioner: Christopher Landau, Washington, D. C. For respondents: Adam G. Unikowsky, Washington, D. C.; and Nicole A. Saharsky, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae).
Jun 9 2016	Adjudged to be AFFIRMED. Kagan, J., delivered the opinion of the Court, in which Roberts, C. J., and Kennedy, Ginsberg, and Alito, JJ., joined. Ginsburg, J., filed a concurring opinion, in which Thomas, J., joined. Thomas, J., filed an opinion concurring in part and concurring in the judgment. Breyer, J., filed a dissenting opinion, in which Sotomayor, J., joined.

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
JUL 17 2015
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15-108

No.

IN THE
Supreme Court of the United States

THE COMMONWEALTH OF PUERTO RICO,

Petitioner,

v.

LUIS M. SÁNCHEZ VALLE AND
JAIME GÓMEZ VÁZQUEZ,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Puerto Rico

PETITION FOR WRIT OF CERTIORARI

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July 17, 2015

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QUESTION PRESENTED

Whether the Commonwealth of Puerto Rico and the Federal Government are separate sovereigns for purposes of the Double Jeopardy Clause of the United States Constitution.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner, the Commonwealth of Puerto Rico, was respondent in the Puerto Rico Supreme Court.

Respondents, Luis M. Sánchez Valle and Jaime Gómez Vázquez, were petitioners in the Puerto Rico Supreme Court.

René Rivero Betancourt and Rafael A. Delgado Rodríguez were defendants below but did not participate in the proceedings before the Puerto Rico Supreme Court.

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INTRODUCTION

This is the most important case on the constitutional relationship between Puerto Rico and the United States since the establishment of the Commonwealth in 1952. A divided Puerto Rico Supreme Court overruled its prior decision in *People v. Castro García*, 20 P.R. Offic. Trans. 775 (1988), and held below that the Double Jeopardy Clause of the Federal Constitution prevents an individual who has been tried, acquitted, or convicted under federal law from being prosecuted for the same offense under Puerto Rico law. That is so, the court asserted, because the Federal Government and Puerto Rico are not "dual sovereigns" for federal double jeopardy purposes. Rather, the Court declared, all of Puerto Rico's laws—including its criminal laws—are based on authority delegated by the United States Congress, not on authority delegated by the people of Puerto Rico through their democratically enacted Constitution.

It is hard to overstate the legal, practical, and political implications of that erroneous holding. It strips Puerto Rico of the ability to enforce its own criminal laws without federal interference, and—as the First Circuit recognized more than half a century ago—"impute[s] to the Congress the perpetration of ... a monumental hoax." *Figueroa v. People of Puerto Rico*, 232 F.2d 615, 620 (1st Cir. 1956). In 1950, Congress enacted Public Law 600, which "offered to the people of Puerto Rico a 'compact' under which, if the people accepted it, as they did, they were authorized to 'organize a government pursuant to a constitution of their *own* adoption.'" *Id.* (emphasis added; quoting Pub. L. No. 81-600, 64 Stat. 319).

The Puerto Rico Constitution, thus, was not imposed by Congress, but adopted and ratified by "[w]e, the people of Puerto Rico." P.R. Const. pmbl. It follows that the laws of Puerto Rico enacted pursuant to that Constitution flow from sovereign authority delegated by the people of Puerto Rico, not from sovereign authority delegated by Congress.

The Puerto Rico Supreme Court's contrary conclusion is not only wrong, but deepens a direct and acknowledged circuit conflict on the specific question whether the Commonwealth of Puerto Rico and the Federal Government are separate sovereigns for federal double jeopardy purposes. In *United States v. López Andino*, 831 F.2d 1164 (1st Cir. 1987), the First Circuit held that "Puerto Rico's ... criminal laws, like those of a state, *emanate from a different source* than the federal laws," and thus Puerto Rico and the Federal Government are "dual sovereigns" for double jeopardy purposes, *id.* at 1167-68 (emphasis added). In the decision below, the Puerto Rico Supreme Court—which had previously adopted the First Circuit's *López Andino* analysis, *see Castro García*, 20 P.R. Offic. Trans. at 807-08—rejected that approach and instead endorsed the contrary approach of *United States v. Sánchez*, 992 F.2d 1143 (11th Cir. 1993). In that case, the Eleventh Circuit specifically "disagree[d] with the conclusion of the First Circuit [in *López Andino*] that Congress' decision to permit self-governance in Puerto Rico makes Puerto Rico a separate sovereign for double jeopardy purposes," and held—like the Puerto Rico Supreme Court in this case—that "Puerto Rican courts ... derive their authority to punish from the United States Congress," and thus "prosecutions in Puerto Rican courts do not fall

within the dual sovereignty exception to the Double Jeopardy Clause," *id.* at 1151, 1153.

This case, in short, has all the ingredients for a grant of certiorari: a manifestly erroneous decision by the Commonwealth's highest court that deepens a direct and acknowledged conflict among the federal courts of appeals on an important and recurring question of federal constitutional law. *See* U.S. S. Ct. R. 10. Indeed, the decision below leads to the anomalous and untenable result that an individual first prosecuted in federal court in Puerto Rico and then prosecuted in Commonwealth court for the same offense can raise a successful federal double jeopardy objection, while a person first prosecuted in Commonwealth court and then prosecuted in federal court in Puerto Rico cannot, *see López Andino*, 831 F.2d at 1167-68. The application of federal constitutional law in a particular jurisdiction should not turn on whether the issue arises in federal court or in the state or Commonwealth court across the street. Accordingly, this Court should grant the petition.

OPINIONS BELOW

The opinion of the Supreme Court of Puerto Rico is reported in the original Spanish at 2015 TSPR 25, 2015 WL 1317010, and a certified English translation is reprinted in the Appendix ("App.") at 1-242a. The opinion of the Court of Appeals of Puerto Rico is unreported, and a certified English translation is reprinted at App. 243-306a. The opinions of the trial court dismissing the indictments against respondents Sánchez Valle and Gómez Vásquez are unreported, and certified English

translations are reprinted at App. 307-29a and 330-52a respectively.

JURISDICTION

The Puerto Rico Supreme Court issued its decision on March 20, 2015. App. 1a. On June 5, 2015, Justice Breyer extended the time within which to file a petition for a writ of certiorari to and including July 20, 2015. This Court has jurisdiction under 28 U.S.C. § 1258.

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Double Jeopardy Clause of the United States Constitution provides that "[n]o person shall be ... subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V

The Territorial Clause of the U.S. Constitution provides in relevant part that "[t]he Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory ... belonging to the United States." U.S. Const. art. IV, § 3, cl. 2.

Public Law 600 of 1950 (entitled "An Act to provide for the organization of a constitutional government by the people of Puerto Rico"), Pub. L. No. 81-600, 64 Stat. 319 (1950), codified at 48 U.S.C. § 731 *et seq.*, Public Law 447 of 1952 (entitled "Joint Resolution approving the constitution of the Commonwealth of Puerto Rico which was adopted by the people of Puerto Rico on March 3, 1952"), Pub. L. No. 82-447, 66 Stat. 327 (1952), and excerpts of the Puerto Rico Constitution are reproduced in the appendix to this petition. *See* App. 353-62a.

STATEMENT OF THE CASE

A. Background

The United States gained possession of Puerto Rico during the Spanish-American War of 1898, and Spain formally ceded the island under the Treaty of Paris signed in December 1898 and ratified in April 1899. *See* Treaty of Peace between the United States of America and the Kingdom of Spain, Apr. 11, 1899, 30 Stat. 1754. After a brief period of military rule, Congress enacted an organic act (widely known as the Foraker Act) to establish a civil government in Puerto Rico. *See* Organic Act of 1900, Ch. 191, 56th Cong., 1st Sess., 31 Stat. 77 (1900). That Act provided for an Executive Branch headed by a Governor appointed by the President of the United States, a House of Delegates elected by qualified voters of Puerto Rico, and a Judicial Branch appointed by the President of the United States. The Foraker Act was replaced in 1917 by a new organic act (widely known as the Jones Act), which created an elected Senate and gave the people of Puerto Rico a bill of rights and United States citizenship. *See* Organic Act of 1917, Pub. L. No. 64-368, 39 Stat. 951 (1917). Under both the Foraker and Jones Acts, all laws enacted by the elected Puerto Rico legislature were submitted to Congress, which retained the power to annul them. *See* 31 Stat. at 83; 39 Stat. at 961.

As pro-democratic and anti-colonial movements swept the globe after the Second World War, pressures for greater autonomy led Congress to revisit the governance of Puerto Rico. The result was the landmark Public Law 600 of 1950, Pub. L. No. 81-600, 64 Stat. 319, App. 353-54a. That statute,

"[f]ully recognizing the principle of government by consent," offered the people of Puerto Rico "in the nature of a compact" the authority to "organize a government pursuant to a constitution of their own adoption." App. 353a (codified at 48 U.S.C. § 731b). Upon approval of the statute by the qualified voters of Puerto Rico in a referendum, the legislature was authorized to call a constitutional convention to draft a constitution for Puerto Rico. *See id.* (codified at 48 U.S.C. § 731c).

In a popular referendum held on June 4, 1951, the people of Puerto Rico accepted the "compact" offered by Congress, and a Constitutional Convention was held from September 1951 to February 1952. App. 355a. That Convention drafted the Puerto Rico Constitution. *See id.* The proposed Constitution was then submitted to the people of Puerto Rico and approved in another popular referendum on March 3, 1952. *See id.*

The Puerto Rico Constitution created a new political entity, the Commonwealth of Puerto Rico ("*Estado Libre Asociado de Puerto Rico*"). P.R. Const. art. I § 1, App. 359a. It specified that the Commonwealth's "political power *emanates from the people* and shall be exercised in accordance with their will, within the terms of the compact agreed upon between the people of Puerto Rico and the United States of America." *Id.* (emphasis added); *see also id.* pmbl., App. 358a ("We understand that the democratic system of government is one in which the will of the people is the source of public power."). It divided the Commonwealth's political power between officials in the "legislative, judicial and executive branches" of the new government, none of the

members of which are appointed by the President of the United States or any other arm of the Federal Government. P.R. Const. art. I § 2, art. III § 1, art. IV § 1, art. V §§ 1, 8, art. VI § 4, App. 359-62a. Instead, all three branches of the government of the Commonwealth are "subordinate to the sovereignty of the people of Puerto Rico." P.R. Const. art. I § 2, App. 359a.

Pursuant to Public Law 600, the Constitution was then submitted to the President of the United States, who—after duly finding, among other things, that it provided for a republican form of government—in turn submitted it to Congress for review. App. 353-56a; *see generally* 48 U.S.C. §§ 731c, d. Congress considered the proposed Constitution, likewise found (among other things) that it provided for a republican form of government, and approved it conditioned on minor revisions to provisions addressing compulsory school attendance and the process for constitutional amendments and the elimination of section 20 recognizing a number of then-novel human rights. *See* Pub. L. No. 82-447, 66 Stat. 327, App. 356-57a. The Senate Report accompanying that legislation explained the Constitution's approval would mean "the people of Puerto Rico will exercise self-government." S. Rep. No. 82-1720, at 6, 7 (1952). President Truman echoed that view both when transmitting the Puerto Rico Constitution to Congress and when signing the Joint Resolution by which Congress approved the Constitution. Under the new Constitution, in President Truman's view, "full authority and responsibility of local self-government will be vested in the people of Puerto Rico." *Public Papers of the Presidents, Harry S. Truman 1952-53*, at 471 (1966),

quoted in *Córdova & Simonpietri Ins. Agency, Inc. v. Chase Manhattan Bank, N.A.*, 649 F.2d 36, 40 (1st Cir. 1981) (Breyer, J.).

Puerto Rico accepted the conditions set forth by Congress, and the Puerto Rico Constitution took effect on July 25, 1952, *see* 48 U.S.C. § 731d Note—a day still celebrated yearly in the Commonwealth as Constitution Day. As a result, numerous provisions of the organic acts governing Puerto Rico—including provisions giving Congress the authority to annul Puerto Rico laws—were repealed, and the remaining provisions were renamed the Federal Relations Act. *See* Pub. L. No. 81-600 §§ 4, 5, 64 Stat. at 319-20 (1950), App. 354a. Shortly thereafter, the United States informed the United Nations that it no longer considered itself obligated to provide reports on conditions in Puerto Rico under a provision of the U.N. Charter requiring such reports from member states responsible "for the administration of territories whose people have not yet attained the full measure of self-government." U.N. Charter art. 73. As the United States explained, in light of the 1952 Constitution, Puerto Rico had become a self-governing jurisdiction. *See* Mem. by Gov't of U.S.A. Concerning the Cessation of Information Under Article 73(e) of the Charter with regard to the Commonwealth of Puerto Rico, quoted in *Córdova*, 649 F.2d at 41 n.28. In response, the U.N. General Assembly acknowledged that "the people of the Commonwealth of Puerto Rico, by expressing their will in a free and democratic way, have achieved a new constitutional status," and "have effectively exercised their right to self-determination." G.A. Res. 748 (VIII), U.N. GAOR, 8th Sess., 459th plen. mtg. at

26 (1953), quoted in *Igartúa-De La Rosa v. United States*, 417 F.3d 145, 149 n.5 (1st Cir. 2005).

The Puerto Rico Constitution, as noted above, vests "[t]he legislative power ... in a Legislative Assembly," which consists of two houses, the Senate and the House of Representatives, whose members are elected by the people of Puerto Rico. P.R. Const. art. III § 1, App. 360a. All the laws of Puerto Rico—including the criminal laws—are enacted pursuant to that power. Indeed, the Constitution specifies that "[a]ll criminal actions in the courts of the Commonwealth shall be conducted *in the name and by the authority* of 'The People of Puerto Rico.'" P.R. Const. art. VI § 18, App. 362a (emphasis added). Thus, like the States, Puerto Rico is subject to two different criminal justice systems—one established by its own laws and enforced by its own prosecutors, and the other established by Congress and enforced by federal prosecutors.

B. Proceedings Below

On September 28, 2008, Puerto Rico prosecutors indicted respondent Luis Sánchez Valle for (1) the illegal sale of firearms and ammunition without a license, in violation of P.R. Laws Ann. tit. 25, § 458, and (2) the illegal carrying of a firearm, in violation of P.R. Laws Ann. tit. 25 § 458c. *See* App. 2a. Subsequently, while that Commonwealth prosecution was pending, a federal grand jury also indicted Sánchez Valle for the illegal sale of firearms and ammunition without a license. *See id.*; *see also* 18 U.S.C. §§ 922(a)(1)(A), 923(a), 924(a)(1)(D), 924(a)(2). Sánchez Valle pleaded guilty to the federal charges and received a five-month prison

sentence followed by five months' house arrest and three years' supervised release. App. 2-3a.

After pleading guilty to the federal charges, Sánchez Valle moved to dismiss the prosecution in Puerto Rico court—for which he was subject to a much longer sentence—as a violation of his rights under the Double Jeopardy Clause of the United States Constitution. The trial court agreed and dismissed the charges. *Id.* at 307-29a.

Similarly, on September 28, 2008, Puerto Rico prosecutors indicted respondent Jaime Gómez Vázquez for (1) the illegal sale of a firearm without a license, *see* P.R. Laws Ann. tit. 25, § 458, (2) the illegal carrying of a rifle, *see id.* § 458f, and (3) the illegal transfer of a mutilated weapon, *see id.* § 458i. App. 3-4a. As with Sánchez Valle, a federal grand jury subsequently indicted Gómez Vázquez for selling firearms in interstate commerce without a license. *Id.* at 4a. He pleaded guilty to the federal charges and received an eighteen-month prison sentence followed by three years' supervised release. *Id.* at 4-5a.

Gómez Vázquez, like Sánchez Valle, then moved to dismiss his pending prosecution in Puerto Rico court—for which, again like Sánchez Valle, he was subject to a much longer sentence—as a violation of his rights under the Double Jeopardy Clause of the Federal Constitution. Once again, the trial court agreed and dismissed the charges. *Id.* at 330-52a.

The Commonwealth appealed both dismissals to the Puerto Rico Court of Appeals, and that Court reversed. *Id.* at 243-306a. As the Court explained, the double jeopardy issue in the case was controlled by the Puerto Rico Supreme Court's decision in

Castro García, 20 P.R. Offic. Trans. 775, which held that the Commonwealth of Puerto Rico and the Federal Government are separate sovereigns for double jeopardy purposes, thus removing any double jeopardy bar to a subsequent prosecution by the other sovereign. App. 262a, 267-77a, 279-81a. Judge Medina Monteserín concurred on the ground that *Castro García* "prevails at this time in our jurisdiction," but expressed her view that "there is room to review and discuss said caselaw." App. 284a. Judge González Vargas also filed a separate statement underscoring his view that the authority for Puerto Rico's criminal laws "emanates ... from the People of Puerto Rico through their Constitution, which was democratically adopted as the ultimate expression of their will in the exercise of their self-government attributes," and that "[i]t is legally unacceptable and contrary to the dignity of every Puerto Rican to argue that even the adoption of their criminal laws and the indictment for the violation of same are merely the result of gifts or graces by the People of the United States, as if we found ourselves in the times of the crudest colonial regime." App. 304a.

The Puerto Rico Supreme Court granted respondents' petitions for certiorari and consolidated the cases. The Court began by analyzing whether each of the various crimes with which respondents were charged under Puerto Rico law was, for federal double jeopardy purposes, the "same offence" to which they had pleaded guilty under federal law. *See* App. 7-10a. To that end, the Court applied this Court's "same-elements" test. *See id.* (citing *Blockburger v. United States*, 284 U.S. 299, 304 (1932)). With respect to the crime of selling a

firearm or ammunition without a license, the Court held that the Puerto Rico crime is a lesser-included offense of its federal counterpart because the elements of both crimes are identical other than the additional interstate-commerce requirement of the federal crime. *See* App. 8-10a. Accordingly, the Court held that, under *Blockburger*, the Commonwealth and federal crimes are the "same offence" for federal double jeopardy purposes. *See* App. 9-10a. The remaining crimes with which respondents were charged under Puerto Rico law did not raise double jeopardy concerns, however, because respondents had not been charged with analogous federal offenses. *See* App. 10a. None of the Justices expressed any disagreement on these threshold issues.

The Justices divided sharply, however, on the question whether the Commonwealth could nevertheless prosecute respondents for the "same offence" to which they had pleaded guilty in federal court. The majority held that it could not, on the theory that the Commonwealth of Puerto Rico and the Federal Government are a single sovereign for purposes of the Double Jeopardy Clause of the Federal Constitution. In particular, the majority held, "Puerto Rico's authority to prosecute individuals is derived from its delegation by United States Congress and not by virtue of its own sovereignty." App. 65a (emphasis omitted); *id.* at 66a ("[T]he Commonwealth of Puerto Rico is not a sovereign entity inasmuch as, being a territory, its ultimate source of power to prosecute offenses is derived from the United States Congress.") (emphasis omitted). Unless and until Puerto Rico becomes a State, in the majority's view, it has no

claim to any form of sovereignty and the dual sovereign doctrine does not apply. App. 67-68a. The majority thus overruled its contrary holding in *Castro García* as "clearly erroneous," reversed the Court of Appeals' judgment with respect to the charges against respondents under Commonwealth law for the illegal sale of firearms and ammunition without a license, and ordered the dismissal of those charges. App. 69a.

The majority recognized that its decision conflicted with the First Circuit's decision in *López Andino*, which held that "the Puerto Rico Federal Relations Act and the creation of the Constitution of the Commonwealth of Puerto Rico altered the relationship between Puerto Rico and the United States," and rendered the Commonwealth "a sovereign for purposes of the dual sovereignty doctrine." App. 29-30a (citing *López Andino*, 831 F.2d at 1168). The majority pointed out, however, that "the Eleventh Circuit faced the same controversy" in *Sánchez*, and—"[c]ontrary to the First Circuit"—concluded that Puerto Rico is "not a separate sovereign" for federal double jeopardy purposes. *Id.* at 30a (citing 992 F.2d 1143). The majority praised the Eleventh Circuit's *Sánchez* ruling as "an exercise of intellectual honesty" for recognizing that "the development of the Commonwealth of Puerto Rico had not granted our courts a source of punitive authority derived from an inherent sovereignty." *Id.* at 30-31a.

Chief Justice Fiol Matta, joined by Justice Oronoz Rodríguez, concurred in the judgment. *See* App. 71-190a. The Chief Justice sharply disagreed with the majority's application of the dual sovereignty

doctrine as a matter of federal constitutional law. *Id.* at 72-73a. In her view, "the drafting and ratification of our Constitution by the People of Puerto Rico was not a marginal and insignificant event, as the Majority insists," but rather an exercise of popular sovereignty. *Id.* at 131a. Thus, even though Puerto Rico is not a State, its "ultimate source of power and authority to create and punish crimes has been the People of Puerto Rico" ever since the Puerto Rico Constitution took effect in 1952. *Id.* at 132a. She thus concluded that the Double Jeopardy Clause of the Federal Constitution did not bar respondents' prosecution by both Puerto Rico and federal authorities. *Id.* at 156-57a. Nonetheless, the Chief Justice would have held that Puerto Rico should not recognize the dual sovereignty doctrine for purposes of its *own* constitutional prohibition on Double Jeopardy, *see* P.R. Const. art. II § 11, App. 360a, and thus would have granted respondents relief under the Puerto Rico Constitution, *id.* at 164-90a.

Justice Rodríguez Rodríguez wrote a scathing dissent that also rejected the majority's federal dual sovereignty analysis. *See* App. 191-242a. She accused the majority of elevating its "ideological" views regarding Puerto Rico statehood over legal analysis. *Id.* at 241a. The majority's legal analysis, according to Justice Rodríguez Rodríguez, is "incompatible with" this Court's dual sovereignty cases. *Id.* at 195a; *see also id.* at 241-42a. She accordingly called upon "the United States Supreme Court to intervene in this case to bring the majority of this Court back to the fold of the United States Constitution." *Id.* at 196a.

This petition follows.

REASONS FOR GRANTING THE WRIT

I. The Decision Of The Puerto Rico Supreme Court Deepens A Direct And Acknowledged Circuit Conflict.

This case presents and deepens a circuit conflict about as stark as they come. The First Circuit, in *López Andino*, held that the Commonwealth of Puerto Rico and the Federal Government are not a single sovereign for purposes of the Double Jeopardy Clause of the Federal Constitution, so that the Clause does not prevent successive prosecution by each sovereign for the same offense. *See* 831 F.2d at 1167-68; *see also United States v. Bonilla Romero*, 836 F.2d 39, 42 n.2 (1st Cir. 1987) (reaffirming that *López Andino* "is the law of this Circuit"); *United States v. Benmuhar*, 658 F.2d 14, 18 (1st Cir. 1981) (rejecting double jeopardy challenge). The First Circuit in *López Andino* thus affirmed a federal conviction over an argument that it was barred by a prior Puerto Rico conviction on the ground that "the Commonwealth ... for double jeopardy purposes is treated as a state," and "[t]herefore, the fifth amendment does not prohibit the federal prosecution." 831 F.2d at 1168.

The Eleventh Circuit, in sharp contrast, held in *Sánchez* that the Commonwealth of Puerto Rico and the Federal Government *are* a single sovereign for purposes of the Double Jeopardy Clause of the Federal Constitution, so that the Clause *does* prevent successive prosecution by each sovereign for the same offense. *See* 992 F.2d at 1148-53. In so holding, the Eleventh Circuit specifically rejected *López Andino*. *See id.* at 1151 ("We disagree with the conclusion of the First Circuit that Congress'

decision to permit self-governance in Puerto Rico makes Puerto Rico a separate sovereign for double jeopardy purposes."). The Eleventh Circuit in *Sánchez* thus reversed a federal conviction of murder for hire on the ground that it was barred by a prior Puerto Rico conviction for the same offense. *See* 992 F.2d at 1159.

The Puerto Rico Supreme Court in this case flipped from one side of this direct and acknowledged circuit conflict to the other. In 1988, that Court in *Castro García* had endorsed *López Andino*, holding that "[t]he First Circuit Court of Appeals' approach to the specific question posed by the present case is very convincing." 20 P.R. Offic. Trans. at 807. Like *López Andino*, *Castro García* thus held that the Commonwealth of Puerto Rico and the Federal Government are not a single sovereign for federal double jeopardy purposes, so that the Clause does not prevent successive prosecution by each sovereign for the same offense. *See id.* at 782-819.

In this case, however, the Puerto Rico Supreme Court overruled *Castro García*. *See* App. 2a, 33a, 67a. The Court explained that, in *Castro García*, "this Court adopted the view of the court of Appeals for the First Circuit and held that the Commonwealth of Puerto Rico was a sovereign for purposes of the double jeopardy clause." App. 31a. The Court now, however, repudiated that approach. *See* App. 33a ("The grounds used by this Court [in *Castro García*] are wrong from a strictly legal point of view."); App. 67a ("[W]e overrule [*Castro García*] and conclude that a person who was prosecuted in federal court cannot be prosecuted for the same offense in the Puerto Rico courts because that would

constitute a violation of the constitutional protection against double jeopardy, as provided in the Fifth Amendment to the Constitution of the United States.").

The conflict between the First Circuit, on the one hand, and the Puerto Rico Supreme Court and the Eleventh Circuit, on the other, stems from a fundamental disagreement over the source of authority for Puerto Rico law. The First Circuit holds that "[Puerto Rico's] criminal laws, like those of a state, emanate from a different source than the federal laws"—from "'the people of Puerto Rico,'" who engaged in an exercise of popular sovereignty in 1952 by "'organiz[ing] a government pursuant to a constitution of their own adoption.'" *López Andino*, 831 F.2d at 1168 (quoting Pub. L. No. 81-600, 64 Stat. 319 (1950), App. 353a). Under this view, in light of the adoption of the 1952 Constitution, "the government of Puerto Rico is no longer a federal government agency exercising delegated power." *United States v. Quiñones*, 758 F.2d 40, 42 (1st Cir. 1985) (citing *Mora v. Mejías*, 206 F.2d 377, 386-88 (1st Cir. 1953)); *see also id.* ("'[T]he constitution of the Commonwealth is not just another Organic Act of the Congress.'") (quoting *Figueroa*, 232 F.2d at 620); *Córdova*, 649 F.2d at 39 ("The [Federal Relations Act] and the Puerto Rico Constitution were intended to work a significant change in the relation between Puerto Rico and the rest of the United States.").

The Puerto Rico Supreme Court and the Eleventh Circuit, in sharp contrast, hold that Puerto Rico law derives from delegated *federal* authority, so that the Puerto Rico legislature is essentially no more than an arm of Congress. *See* App. 65a ("Puerto Rico's

authority to prosecute individuals is derived from its delegation by United States Congress and not by virtue of its own sovereignty.") (emphasis omitted); *id.* at 66a ("[Puerto Rico's] ultimate source of power to prosecute offenses is derived from the United States Congress.") (emphasis omitted); *Sánchez*, 992 F.2d at 1152 ("The authority with which Puerto Rico brings charges as a prosecuting entity derives from the United States as sovereign."). Under this view, "[d]espite passage of the Federal Relations Act and the Puerto Rico Constitution, Puerto Rican courts continue to derive their authority to punish from the United States Congress." *Id.* at 1153.

This direct and acknowledged conflict on a question of federal constitutional law warrants this Court's review. The various opinions of the Justices of the Puerto Rico Supreme Court below could hardly have canvassed the relevant issues any more extensively, and confirmed that those Justices are firmly entrenched in their views. Likewise, the First Circuit's holding in *López Andino* reflects that court's longstanding, and often repeated, view that the constitutional relationship between Puerto Rico and the United States fundamentally changed as a result of the adoption of the Puerto Rico Constitution in 1952. *See, e.g.*, *Quiñones*, 758 F.2d at 41-43; *Córdova*, 649 F.2d at 39-42; *Figueroa*, 232 F.2d at 619-20; *Mora*, 206 F.2d at 386-88.

II. The Decision Of The Puerto Rico Supreme Court Is Manifestly Incorrect.

The Puerto Rico Supreme Court not only flipped sides on a direct and acknowledged circuit conflict, but chose the wrong side. Its decision reflects a manifest misunderstanding of this Court's double

jeopardy precedents, and in particular the dual sovereignty doctrine elaborated in those precedents.

The Double Jeopardy Clause of the Fifth Amendment, as this Court has long held, protects a defendant against successive prosecution for the same offense by the *same* sovereign, not by a *different* sovereign. *See, e.g.*, *Heath v. Alabama*, 474 U.S. 82, 87-88 (1985); *United States v. Wheeler*, 435 U.S. 313, 320 (1978); *Abbate v. United States*, 359 U.S. 187, 193-94 (1959); *Bartkus v. Illinois*, 359 U.S. 121, 128-39 (1959); *United States v. Lanza*, 260 U.S. 377, 382 (1922). That is because a crime is deemed to be an offense against a particular sovereign; "[w]hen a defendant in a single act violates the 'peace and dignity' of two sovereigns by breaking the laws of each, he has committed two distinct 'offences.'" *Heath*, 474 U.S. at 88 (quoting *Lanza*, 260 U.S. at 382); *see also id.* ("[W]hen the same act transgresses the laws of two sovereigns, 'it cannot be truly averred that the offender has been twice punished for the same offence; but only that by one act he has committed two offences, for each of which he is justly punishable.'") (quoting *Moore v. Illinois*, 55 U.S. (14 How.) 13, 19 (1852)); *see also Westfall v. United States*, 274 U.S. 256, 258 (1927) (Holmes, J.) (the proposition that different sovereigns may punish the same conduct "is too plain to need more than statement").

Because there is no question that the States and the Federal Government are separate sovereigns, a prior state prosecution poses no double jeopardy bar to a subsequent federal prosecution, *see, e.g.*, *Abbate*, 359 U.S. at 189-95; *Lanza*, 260 U.S. at 382, and a prior federal prosecution poses no federal double

jeopardy bar to a subsequent state prosecution, *see, e.g.*, *Bartkus*, 359 U.S. at 128-38. (States are free, of course, to reject the dual sovereignty doctrine as a matter of their *own* constitutional law, *see id.* at 135-36, as the concurring opinion below would have done, *see* App. 177-80a, 188-90a (Fiol Matta, C.J., concurring in the judgment) (citing *Commonwealth v. Mills*, 286 A.2d 638, 642 (Pa. 1971); *State v. Hogg*, 385 A.2d 844, 847 (N.H. 1978)). Similarly, because the various States are different sovereigns, a prior prosecution by one State poses no federal double jeopardy bar to a subsequent prosecution by another State. *See, e.g.*, *Heath*, 474 U.S. at 89-93.

The *same* sovereign, however, may not prosecute an individual twice for the same offense. *See, e.g.*, *Benton v. Maryland*, 395 U.S. 784, 793-98 (1969). And that is true even where that sovereign delegates its power to a different entity that enacts its own laws. Thus, a State may not prosecute an individual who has already been prosecuted for the same offense by a municipality of that State; even though the State may treat the municipality as a sovereign entity under its own law, the municipality's power to punish flows from state law. *See, e.g.*, *Waller v. Florida*, 397 U.S. 387, 391-95 (1970). Similarly, the government of a territory (at that time, the Philippine Islands) that "owes its existence wholly to the United States," and whose courts "exert all their powers under and by authority of the same government,—that of the United States" may not prosecute an individual who has already been prosecuted for the same offense by a federal military tribunal. *Grafton v. United States*, 206 U.S. 333, 354-55 (1907); *cf. Puerto Rico v. Shell Co. (P.R.)*, 302 U.S. 253, 264 (1937) (federal laws and territorial

laws of Puerto Rico before adoption of 1952 Constitution "are creations emanating from the same sovereignty" that would trigger federal double jeopardy protection) (dictum).

As this Court has emphasized, the key inquiry in determining whether two entities are separate sovereigns for federal double jeopardy purposes is "the ultimate *source* of the power under which the respective prosecutions were undertaken." *Wheeler*, 435 U.S. at 320 (emphasis added); *see also United States v. Lara*, 541 U.S. 193, 199 (2004); *Heath*, 474 U.S. at 90. The "extent of control exercised by one prosecuting authority over the other" is not material to that inquiry. *Wheeler*, 435 U.S. at 320. Thus, *Wheeler* held that the conviction of a member of the Navajo Tribe in tribal court did not bar a subsequent federal prosecution of that person for the same offense. Even though it was "undisputed" that "Congress has plenary authority to legislate for the Indian tribes in all matters, including their form of government," *id.* at 319, the Court held that the Navajo tribe was a separate sovereign for federal double jeopardy purposes, *see id.* at 322-32. That is because, although the tribe concededly was "subject to ultimate federal control," *id.* at 322, the source of its authority to punish was its own sovereignty, not any power delegated by Congress, *see id.* at 322-32; *see also Lara*, 541 U.S. at 199-200.

The Puerto Rico Supreme Court, like the Eleventh Circuit, erred by holding that the United States Congress, as opposed to the people of Puerto Rico through their Constitution, is the ultimate source of authority for the Commonwealth's criminal laws. *See* App. 65-66a; *Sánchez*, 992 F.2d at 1152-53. That

point may have been true prior to the adoption of the Puerto Rico Constitution in 1952, insofar as the Puerto Rico legislature at that time exercised authority delegated by Congress through organic acts. *See, e.g.*, *Shell*, 302 U.S. at 264 (dictum); *cf. Grafton*, 206 U.S. at 353-55. But it is manifestly not true after the adoption of the Commonwealth's Constitution in 1952, which "work[ed] a significant change in the relation between Puerto Rico and the rest of the United States." *Córdova*, 649 F.2d at 39.

Indeed, Congress itself could hardly have made this point more clear. Public Law 600 of 1950 offered the people of Puerto Rico a "compact" under which they could engage in an exercise of popular sovereignty by "organiz[ing] a government pursuant to a constitution of their *own* adoption." App. 353a (codified at 48 U.S.C. § 731b; emphasis added). The people of Puerto Rico accepted that offer, assembled a Constitutional Convention, and drafted their own Constitution.

That Constitution leaves no doubt about the source of its authority It is ordained and established by "[w]e, the people of Puerto Rico." P.R. Constit. pmbl., App. 358a. It confirms that "the will of the people is the source of public power." *Id.* It creates a new political entity, the Commonwealth of Puerto Rico, and specifies that "[i]ts political power *emanates from the people* and shall be exercised in accordance with their will, within the terms of the compact agreed upon by the people of Puerto Rico and the United States of America." *Id.*, art. I § 1, App. 359a (emphasis added). It creates the "legislative, judicial and executive branches" of the Commonwealth government, and provides that all

three branches "shall be equally subordinate to the *sovereignty of the people of Puerto Rico.*" *Id.*, art. I § 2, App. 359a (emphasis added). It vests "[t]he legislative power" of the Commonwealth "in a Legislative Assembly," *id.*, art. III § 1, App. 360a, and "[t]he judicial power" of the Commonwealth in "a Supreme Court, and in such other courts as may be established by law," *id.*, art. V § 1, App. 361a. And it provides that "[a]ll criminal actions in the courts of the Commonwealth shall be conducted in the name and by the authority of the 'People of Puerto Rico.'" *Id.*, art. VI § 18, App. 362a.

That Constitution was duly submitted to the President of the United States, who in turn submitted it to Congress for its approval. App. 355-56a. Congress considered the proposed Constitution, and approved it conditioned on minor revisions to provisions addressing compulsory school attendance and the process for constitutional amendments and the elimination of section 20 recognizing a number of then-novel human rights. *See* Pub. L. No. 82-447, 66 Stat. 327, App. 356-57a.

By approving the Constitution of the Commonwealth of Puerto Rico, Congress recognized that—as the Constitution makes clear on its face—the people of Puerto Rico had exercised their *own* sovereignty to establish their *own* government to enact their *own* laws. The fact that Congress reviewed the proposed Puerto Rico Constitution, and conditioned its approval thereof on certain changes, in no way negates the exercise of popular sovereignty that created that Constitution in the first place. To the contrary, the Constitution did not go into effect until the Puerto Rico Constitutional Convention

"declared in a formal resolution its acceptance *in the name of the people of Puerto Rico* of the conditions of approval" established by Congress. Pub. L. No. 82-447, 66 Stat. at 327-28, App. 357a (emphasis added). This is precisely the process followed by prospective States seeking admission to the Union. *See, e.g.*, Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339 (1958); Hawaii Admission Act, Pub. L. No. 86-3, 73 Stat. 4 (1959). And it would be fanciful to suggest that congressional approval of a state constitution, conditional or otherwise, in any way renders such a constitution nothing more than an act of Congress. *See, e.g.*, Nebraska Admissions Act, Ch. 36, 39th Cong., 2d Sess., 14 Stat. 391 (1867) (conditional approval of Nebraska Constitution).

Nor does the fact that Congress authorized the exercise of popular sovereignty that led to the adoption of the Puerto Rico Constitution render it any less an exercise of popular sovereignty. To the contrary, as this Court has explained, Congress can recognize and confirm an exercise of sovereignty by a dependent entity. *See Lara*, 541 U.S. at 203-04. In that case, Congress recognized and confirmed the sovereignty of an Indian tribe to apply its criminal laws to an Indian who was not a member of the tribe, *see* 25 U.S.C. § 1301(2), even though this Court had previously held that the tribe had no such sovereignty, *see Duro v. Reina*, 495 U.S. 676, 689-92 (1990). The Court held that this was a valid exercise of congressional power that rendered the tribe a separate sovereign for federal double jeopardy purposes. *See Lara*, 541 U.S. at 199-207. The Court justified that holding in part by noting that Congress had also "made adjustments to the autonomous status of other such dependent entities—sometimes

making far more radical adjustments than those at issue here." *Id.* at 203. In support of that point, the Court noted, among other examples, Public Law 600 and the Puerto Rico Constitution, and cited with approval the First Circuit's decision in *Córdova*. *See id.* at 204.

Other decisions of this Court only confirm that the laws of the Commonwealth of Puerto Rico derive from sovereign authority delegated by the people of Puerto Rico, not from Congress. In *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 670-73 (1974), this Court held that the laws of Puerto Rico were "State statute[s]" within the meaning of the Three-Judge Court Act, 28 U.S.C. § 2281. The Court based that holding on the "significant changes in Puerto Rico's governmental structure" resulting from the establishment of the Commonwealth by the 1952 Constitution. 416 U.S. at 672. As the Court explained, the Commonwealth was "'organized as a body politic *by the people of Puerto Rico* under their *own* constitution.'" *Id.* (emphasis added; quoting *Mora*, 206 F.2d at 387). The laws of the Commonwealth thus reflect the sovereign will of the people of Puerto Rico, and are worthy of the solicitude given to "[S]tate statutes" under the Three-Judge Court Act—in sharp contrast to laws enacted by a mere territorial legislature. *See id.* at 670-75 (distinguishing *Stainback v. Mo Hock Ke Lo Po*, 336 U.S. 368 (1949), which held that the Three-Judge Court Act did not apply to laws enacted by the Territory of Hawaii).

The Court built upon *Calero-Toledo* in *Examining Bd. of Engineers, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572 (1976). The issue there was

whether a federal statute giving federal district courts jurisdiction over actions "to redress the deprivation, under color of any *State* law ... of any right, privilege or immunity" secured by federal law, applied to actions challenging laws of the Commonwealth of Puerto Rico. *Id.* at 574-75 & n.1 (emphasis added). In answering that question in the affirmative, the Court emphasized that Public Law 600 authorized the people of Puerto Rico "to draft their *own* constitution," and that, in light of that Constitution, "Puerto Rico now elects its Governor and legislature; appoints its judges, all cabinet officials, and lesser officials in the executive branch; ... and amends its *own* civil and criminal code." 426 U.S. at 593, 594 (emphasis added; internal quotation omitted); *see also id.* at 597 ("[A]fter 1952, ... Congress relinquished its control over the organization of the local affairs of the island and granted Puerto Rico a measure of autonomy comparable to that possessed by the States.").

And in *Rodríguez v. Popular Democratic Party*, 457 U.S. 1 (1982), this Court upheld "[t]he methods by which the people of Puerto Rico and their representatives have chosen to structure the Commonwealth's electoral system" against a federal constitutional challenge, *id.* at 8. In so ruling, this Court held that those methods are entitled to "substantial deference" precisely because "Puerto Rico, like a state, is an autonomous political entity, '*sovereign* over matters not ruled by the [federal] Constitution.'" *Id.* (quoting *Calero-Toledo*, 416 U.S. at 673, and citing *Córdova*, 649 F.2d at 39-42).

Indeed, to conclude that the Legislature of Puerto Rico is an arm of Congress exercising authority

delegated by Congress would be to deem the Puerto Rico Constitution and the establishment of the Commonwealth of Puerto Rico "a monumental hoax." *Figueroa*, 232 F.2d at 620. As specified in the Puerto Rico Constitution, which was adopted by the people of Puerto Rico and approved by Congress, the laws of Puerto Rico flow from sovereign authority delegated by the people of Puerto Rico. *See* P.R. Const. pmbl., App. 358a; art. I § 1, App. 359a. That simple point is the beginning and the end of this case.

The Puerto Rico Supreme Court and the Eleventh Circuit concluded otherwise only by adopting a narrow and wooden interpretation of sovereignty In their view, federal power over Puerto Rico under the Territorial Clause, U.S. Const. art. IV § 3, cl. 2, necessarily negates any possibility of Puerto Rico sovereignty. *See* App. 65-67a; *Sánchez*, 992 F.2d at 1152-53. That approach, however, turns our entire system of government on its head. The genius of the Founders was to "split the atom of sovereignty," and thereby to establish "two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it." *Alden v. Maine*, 527 U.S. 706, 751 (1999) (internal quotations and brackets omitted). There is no inconsistency in recognizing federal sovereignty in Puerto Rico while also recognizing Puerto Rico sovereignty, just as there is no inconsistency in recognizing federal sovereignty in California while also recognizing California sovereignty. Thus, to recognize that the laws of Puerto Rico stem from sovereign authority delegated by the people of Puerto Rico through their own Constitution is not to negate United States sovereignty in the Commonwealth.

Both flags can, and do, fly together side by side on the island.

The Puerto Rico Supreme Court and the Eleventh Circuit thus missed the point by focusing on the extent of Congress' authority over Puerto Rico under the Territorial Clause. *See* App. 51-52a, 65-67a; *Sánchez*, 992 F.2d at 1152-53. Whether Puerto Rico is a separate sovereign for federal double jeopardy purposes has nothing to do with the extent of any such authority. As noted above, that is the lesson of *Lara* and *Wheeler*—the Indian tribes are separate sovereigns for federal double jeopardy purposes *regardless* of the extent of congressional authority over them. *See Lara*, 541 U.S. at 204; *Wheeler*, 435 U.S. at 320, 326. The extent of Congress' ongoing authority over Puerto Rico under the Territorial Clause, if any, is similarly irrelevant to the application of the dual sovereignty doctrine. *Cf. Flores de Otero*, 426 U.S. 593-94, 597 (noting that, in light of the 1952 "'compact'" in which the people of Puerto Rico adopted their own Constitution, "Congress relinquished its control over the organization of local affairs of the island") (quoting 48 U.S.C. § 731b). Thus, the Puerto Rico Supreme Court's observation that "Puerto Rico did not cease to be a territory of the United States" within the meaning of the Territorial Clause after 1952, App. 65a, adds nothing to the analysis.

It follows that the summary decision in *Harris v. Rosario*, 446 U.S. 651, 651-52 (1980) (*per curiam*), which holds that Congress has the authority to treat Puerto Rico differently than a State under the Territorial Clause, has no bearing here. That case involved the scope of Congress' power under the

Federal Constitution to apply federal law to Puerto Rico, not the source of Puerto Rico's power under the *Commonwealth* Constitution to enact its own laws. Again, this case has nothing to do with the extent of Congress' power to apply *federal* law to Puerto Rico, but instead Puerto Rico's power to enforce its *own* criminal laws enacted under its *own* Constitution.

III. The Decision Of The Puerto Rico Supreme Court Presents An Important And Recurring Question Of Federal Law.

Finally, this Court's review is warranted because the decision below presents an important and recurring question of federal law. As a result of that decision, Puerto Rico authorities have lost the ability to enforce their own criminal laws without the prospect of federal interference. These cases prove the point. Both respondents were indicted for violations of Puerto Rico law *before* they were indicted for violations of federal law. *See* App. 2a, 4a; *id.* at 196a, 199a (Rodríguez Rodríguez, J., dissenting). They promptly pleaded guilty to the federal offenses, however, and received far lighter sentences than they might have received for their crimes under Puerto Rico law. *See* App. 197a n.5 (Rodríguez Rodríguez, J., dissenting). By holding that the Double Jeopardy Clause of the Federal Constitution requires dismissal of the Commonwealth prosecution, the Puerto Rico Supreme Court has essentially stripped the Commonwealth of control over its own criminal laws. *See* App. 194-95a (Rodríguez Rodríguez, J., dissenting).

This Court has specifically warned against "the 'undesirable consequences' that would result from

the imposition of a double jeopardy bar in such circumstances." *Wheeler*, 435 U.S. at 317 (quoting *Abbate*, 359 U.S. at 195). "Prosecution by one sovereign for a relatively minor offense might bar prosecution by the other for a much graver one, thus effectively depriving the latter of the right to enforce its own laws." *Id.* at 318. This "'shocking and untoward'" result, *id.* at 318 n.8 (quoting *Bartkus*, 359 U.S. at 137), which effectively puts Puerto Rico prosecutors in a "race to the courthouse" with federal prosecutors, *Heath*, 474 U.S. at 93, underscores the urgent need for this Court's review.

And the conflict presented by this case only compounds the anomaly. Because the First Circuit holds that there is *no* federal double jeopardy bar to a federal prosecution of an individual who has been tried, acquitted, or convicted for the same offense under Puerto Rico law, *see López Andino*, 831 F.2d at 1167-68, the application of the federal Double Jeopardy Clause in Puerto Rico now turns on whether a criminal defendant was prosecuted first under federal or Commonwealth law. *See e.g.*, *United States v. Barros-Villahermosa*, __ F. Supp. 3d __, 2015 WL 1254878, at *3-5 (D.P.R. Mar. 12, 2015) (rejecting Double Jeopardy challenge). Where the defendant was tried, acquitted or convicted first in Commonwealth court, the federal Double Jeopardy Clause poses no barrier to a subsequent federal prosecution, but where (as here) the defendant was tried, acquitted or convicted first in federal court, that same Clause bars a subsequent prosecution in Commonwealth court. This Court should not tolerate such an arbitrary and capricious state of affairs. Such a "conflict ... between two courts whose jurisdiction" covers the same territory "is, of course,

a substantial reason for granting certiorari under this Court's Rule 10." *Yee v. City of Escondido*, 503 U.S. 519, 537-38 (1992).

Finally, this case presents an excellent vehicle for resolving the conflict. There is no dispute here that the federal and Puerto Rico crimes are the "same offence" for federal double jeopardy purposes—none of the Justices of the Puerto Rico Supreme Court disputed that point, and indeed, a lesser included offense is paradigmatically the "same offense" for such purposes. *See, e.g.*, *Brown v. Ohio*, 432 U.S. 161, 169 (1977); *Illinois v. Vitale*, 447 U.S. 410, 420-21 (1980); *see generally* App. 8-10a; *id.* at 80-81a (Fiol Matta, C.J., concurring in judgment); *id.* at 196-200a (Rodríguez Rodríguez, J., dissenting). In addition, the various opinions of the Puerto Rico Supreme Court Justices below, as well as the First Circuit's opinion in *López Andino* and the Eleventh Circuit's opinion in *Sánchez*, set forth in great detail the conflicting positions on the question presented.

CONCLUSION

For the foregoing reasons, the Court should grant this petition for writ of certiorari.

Respectfully submitted,

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APPENDIX

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[CERTIFIED TRANSLATION]

IN THE PUERTO RICO SUPREME COURT

The People of Puerto Rico
Respondent
v.
Luis M. Sánchez Valle
Petitioner

The People of Puerto Rico
Respondent
v.
Jaime Gómez Vázquez
Petitioner

The People of Puerto Rico
v.
René Rivero Betancourt

The People of Puerto Rico
v.
Rafael A. Delgado Rodriguez

CC-2013-0068
CC-2013-0072

Opinion of the Court issued by Associate Judge Mr. MARTÍNEZ TORRES.

In San Juan, Puerto Rico, on March 20, 2015

To decide these consolidated cases, we must review the rule that we established in *Pueblo v. Castro García*, 120 P.R. Dec. 740 (1988). For the following reasons, we hereby overrule said precedent and hold that, pursuant to the constitutional protection against double jeopardy, and because Puerto Rico is not a federal state, a person who has been acquitted, convicted or prosecuted in federal court cannot be prosecuted for the same offense in the Puerto Rico courts.

I

A. CC-2013-0068

On September 28, 2008, the prosecution filed three charges against Mr. Luis M. Sánchez del Valle accusing him of: 1) a violation of Article 5.01 of the Puerto Rico Weapons Act, 25 P.R. Laws Ann. § 458, for selling a firearm without a permit; 2) a second violation of Article 5.01 of the Puerto Rico Weapons Act, *supra*, for selling ammunition without a permit; and 3) a violation of Article 5.04 of the Puerto Rico Weapons Act, 25 P.R. Laws Ann. § 458c, for illegally carrying a firearm.

Under the same facts, a federal grand jury indicted Mr. Sánchez del Valle of illegally trafficking in weapons and ammunition in interstate commerce. Specifically, he was accused of violating 18 U.S.C. §§ 922(a)(1)(A), 923(a), 924(a)(1)(D) and 2. In contrast to the state court, he was not changed with the offense of illegally carrying weapons. Eventually, the U.S. District Court for the District of Puerto Rico sentenced Mr. Sánchez del Valle to five

months of prison, five months of house arrest and three years of supervised release.

In light of that, Mr. Sánchez del Valle filed a motion to dismiss with the Court of First Instance, Carolina Part, alleging that, pursuant to the constitutional protection against double jeopardy, he could not be prosecuted in Puerto Rico for the same offenses for which he had been found guilty in federal court.

For its part, the prosecution argued that, according to the ruling in *Pueblo v. Castro García*, *supra*, the United States and the Commonwealth of Puerto Rico (the "Commonwealth") derive their authority from different sources and both have the power to punish offenses without infringing the constitutional safeguard against double jeopardy.

The Court of First Instance dismissed the accusations filed against Mr. Sánchez del Valle. It held that Mr. Sánchez del Valle could not be indicted twice for the same offenses and before the same sovereign entity. According to the Court of First Instance, Puerto Rico is not a different and separate jurisdiction from the United States inasmuch as the sovereignty of both arises from the same source, to wit, the United States Congress. It concluded that, given the federal court ruling, the indictments filed in state court violated the constitutional protection against double jeopardy.

Not satisfied, the prosecution turned to the Court of Appeals.

B. CC-2013-0072

On September 28, 2008, the prosecution filed three charges against Mr. Jaime Gómez Vázquez for offenses related to the previous case, accusing him of: 1) a violation of Article 5.01 of the Puerto Rico Weapons Act, 25 P.R. Laws Ann. § 458, for illegally selling and transferring a firearm; 2) a violation of Article 5.07 of the Puerto Rico Weapons Act, 25 P.R. Laws Ann. § 458f, for carrying a riffle; and 3) a violation of Article 5.10 of the Puerto Rico Weapons Act, 25 P.R. Laws Ann. § 458i, for transferring a mutilated weapon. On that same date, a finding of probable cause was made in his absence, a warrant was issued for his arrest and bail was set at $325,000.

Subsequently, before the U.S. District Court for the District of Puerto Rico, a grand jury filed five charges against Mr. Gómez Vázquez, Mr. Gómez Pastrana, Mr. Delgado Rodríguez and Mr. Rodríguez Betancourt for the same offenses for which they had been prosecuted in state court.[1] Specifically, Mr. Gómez Vázquez was accused of violating the following statutes: 18 U.S.C. §§ 922(a)(1)(A), 923(a), 924(a)(1)(D), for the illegal sale of weapons in interstate commerce. In contrast to the state court, he was not charged with illegally carrying long weapons or of weapon mutilation.

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[1] There is no question that the charges are for the same offenses. *Appendix*, at 205 and 214.

In March of 2010, Mr. Gómez Vázquez filed a plea bargain with the U.S. District Court for the District of Puerto Rico whereby he pleaded guilty of the charges filed against him. *Appendix*, at 205. On June 26, 2010, the federal court sentenced him to 18 months of prison and 3 years of supervised release.

On August 27, 2010, Mr. Gómez Vázquez filed with the Court of First Instance, Superior Court, Carolina Part, a motion to dismiss under Rule 64(e) of the Rules of Criminal Procedure, 34 P.R. Laws Ann. Ap. II. He claimed that the double jeopardy clause of the Fifth Amendment to the Constitution of the United States and Section 11 of Article 11 of the Constitution of the Commonwealth of Puerto Rico, P.R. Laws Ann., Volume I, protected him from being prosecuted in the Puerto Rico courts after being charged for the same offenses. Essentially, Mr. Gómez Vázquez argued that the United States and Puerto Rico were the same sovereign within the meaning of said constitutional clause and, therefore, could not submit him to two separate criminal prosecutions for the same offense or behavior. In other words, he argued that the exception to the constitutional protection against double jeopardy, known as the doctrine of "dual sovereignty," did not apply to Puerto Rico.

In response, the prosecution argued that, under this Court's holding in *Pueblo v. Castro García*, *supra*, conduct constituting an offense both in federal court and in state court could be penalized separately in both jurisdictions without violating the constitutional clause against double jeopardy or

implying multiple punishments for the same conduct or behavior. The prosecution argued that the sovereignty of the United States and the sovereignty of Puerto Rico were separate and different for purposes of the referenced constitutional clause. Thus, it stated that Mr. Gómez Vázquez could be tried in the Puerto Rico courts for the same offenses for which he was sentenced in federal court.

In a June 26, 2012 decision, the trial court granted the motion to dismiss filed by Mr. Gómez Vázquez. It ruled that the sovereignty or source of power of Puerto Rico to criminally prosecute its citizens resided and emanated from the federal government through Congress and that, for that reason, the doctrine of "dual sovereignty" did not apply It concluded that the charges filed against Mr. Gómez Vázquez violated the constitutional protection against double jeopardy provided by the Constitution of the United States and the Puerto Rico Constitution. Not satisfied, the prosecution turned to the Court of Appeals.

The Court of Appeals consolidated the cases described above and reversed the trial court's rulings. It ruled that, under current law, a person could be submitted to criminal prosecution both in federal court and in state court for the same criminal behavior without violating the constitutional safeguard against double jeopardy. Judge González Vargas issued a dissenting vote and Judge Medina Monteserín issued a concurring vote.

Not satisfied with the decision, Mr. Sánchez del Valle and Mr. Gómez Vázquez filed separate

petitions before this Court. We issued the writs of *certiorari* and, because they raise the same controversy, we consolidated them. With the benefit of the appearance of all the parties involved, we hereby decide.

II

The constitutional safeguard against double jeopardy protects every person charged with an offense by guaranteeing that he or she will not be "placed at risk of being punished twice for the same offense." P.R. Const. Art. II § 10, P.R. Laws Ann., Vol. 1. *See Pueblo v. Santos Santos*, 189 P.R. Dec. 361 (2013). Likewise, the Fifth Amendment to the Constitution of the United States establishes that "no person may be submitted to trial twice for the same offense."[2] U.S. Const. amend. V, P.R. Laws Ann., Vol. 1. *See Pueblo v. Santiago*, 160 P.R. Dec. 618 (2003); *Pueblo v. Martínez Torres*, 126 P.R. Dec. 561 (1990); *Ohio v. Johnson*, 467 U.S. 493 (1984); E.L. Chiesa Aponte, *Derecho Procesal Penal de Puerto Rico y Estados Unidos*, Colombia, Ed. Forum, 1992, Vol. II § 16.1 (B), at 354.

For the constitutional protection against double jeopardy to apply, several requirements must be met. *Pueblo v. Santos Santos, supra*, at 367. First of all, the proceedings held against the accused must be criminal in nature. *Pueblo v. Santiago, supra*, at

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[2] The original text in English reads: *"nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."*

628. It is necessary, also, for a first trial to have been initiated or held under a valid indictment and in a court with jurisdiction. *Pueblo v. Martínez Torres, supra*, at 568. Lastly, the second process to which the person is being subjected must be for the same offense for which he or she has already been convicted, acquitted, or prosecuted. *Pueblo v. Santiago, supra*, at 629.

In order to assess whether it is the same offense for purposes of the double jeopardy clause, we have employed the rule adopted by the United States Supreme Court in *Blockburger v. United States*, 284 U.S. 299 (1932). *See Pueblo v. Rivera Cintrón*, 185 P.R. Dec. 484, 494 (2012). Under that, the same act, or transaction, constitutes a violation of two different legal provisions if each penal provision breached requires evidence of an additional fact not demanded by the other. *Pueblo v. Rivera Cintrón, supra*, at 494.

In other words, that rule "demands that the court compare [the] definitions [of the offenses] in order to make sure that each one requires, as a minimum, one element not required by the other. If that is the case, there can be punishment for more than one offense." *Id.* at 494, quoting J.P Mañalich Raffo, *El concurso de delitos: bases para su reconstrucción en el derecho penal de Puerto Rico*, 74 Rev. Jur. UPR 1021, 1068 (2005). We emphasize, however, that "if the definition of one of the offenses incorporates all of the elements required by the definition of the other, then it is only one offense, inasmuch as the second one

constitutes a lesser included offense." *Pueblo v. Rivera Cintrón, supra*, at 495.

Upon studying the offenses involved in this case, we note that one of the offenses for which the petitioners were charged in state court constitutes a lesser offense included in one of the federal offenses.

Article 5.01 of the Puerto Rico Weapons Act, 25 P.R. Laws Ann. § 458, establishes the following:

> It shall be necessary to hold a license issued pursuant to the requirements set forth in this chapter to manufacture, import, offer, sell or have available for sale, rent or transfer any firearms or ammunition, or that portion or part of a firearm on which the manufacturer of the same places the serial number of the firearm. Any infraction of this section shall constitute a felony. *[official translation]*

For its part, the federal statute, 18 U.S.C. § 922(a) (1) (A), establishes that:

> It shall be unlawful—for any person—except a licensed importer, licensed manufacturer, or licensed dealer, to engage in the business of importing, manufacturing, or dealing in firearms, or in the course of such business to ship, transport, or receive any firearm in interstate or foreign commerce.

Notice that Article 5.01 of the Puerto Rico Weapons Act, *supra*, contains all of the elements of 18 U.S.C. § 922(a)(1)(A), to wit, that a person without a license may not import, manufacture, sell or deal in firearms or ammunition. We do not find in the state offense any element that is different from those contained in the federal offense. The only difference is that that the state offense does not require for the events to have been committed in the course of interstate or international commerce. But the truth is that upon proving the federal offense, each one of the elements of the state offense is proven as well. In other words, the state offense is a lesser offense included in the federal offense. Therefore, the constitutional clause of double jeopardy provided by the Fifth Amendment to the Constitution of the United States is triggered.

The rest of the offenses charged at the state level are actually different and separate offenses. Article 5.04 of the Puerto Rico Weapons Act, *supra*, typifies the offense of [illegally] carrying and transporting weapons, and the petitioners were not prosecuted at the federal level for a similar offense. The same is true of the violations of Article 5.07 of the Puerto Rico Weapons Act, *supra*, and Article 5.10 of the Puerto Rico Weapons Act, *supra*. The prosecution in federal court was limited to violations for selling weapons and ammunition without a license.

This means that the constitutional issue is limited to the indictments charging Mr. Sánchez del Valle and Mr. Gómez Vázquez with the illegal sale of weapons and ammunition.

III

It is a basic principle of law that the Constitution of the United States established a system of dual sovereignty between the states and the federal government. *Gregory v. Ashcroft*, 501 U.S. 452 (1997). Prior to the adoption of the Constitution, the states came together under the Articles of Confederation. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 803 (1995). In that system, the states retained the larger part of their sovereignty as if they were independent nations united only by treaties. *Id.* Following the Constitutional Convention, the Founding Fathers adopted a plan, not to amend the Articles of Confederation, but to create a new national government with its own government branches. *Id.* In adopting this new system, they conceived a uniform national system and rejected the idea that the United States was a group of independent nations. *Id.* To the contrary, they created a system in which there was a direct link between the people of the United States and the new national government. *Id.* ("In adopting that plan, the Framers envisioned a uniform national system, rejecting the notion that the Nation was a collection of States, and instead creating a direct link between the National Government and the people of the United States."). Thus, the citizens of a state are part of the people of that sovereign state and, simultaneously, are part of the People of the United States.

That new system did not contemplate a full consolidation of the states, but rather a partial

consolidation whereby the state governments would clearly retain all of the attributes of sovereignty that they already possessed and that were not delegated exclusively to the federal government. *Id.* at 801 ("[T]he Constitutional Convention did not contemplate "[a]n entire consolidation of the States into one complete national sovereignty," but only a partial consolidation in which "the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, but that act, exclusively delegated to the United States.").

Thus, in our system of government, the states retain a substantial sovereign authority within the constitutional system. In the words of James Madison:

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite .... The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State. The Federalist No. 45, pp. 292-293 (C. Rossiter ed. 1961) (cited in *Gregory v. Ashcroft, supra*, at 458).

Although at the time of the creation of this new system there were only 13 states, the same concepts applied to all of the states that subsequently became part of the Union. As summarized by the U.S. Supreme Court in one of the most important cases of American constitutional law, *M'Culloch v. State*, 17 U.S. 316, 410 (1819):

> In America, the powers of sovereignty are divided between the government of the Union, and those of the states. They are each sovereign, with respect to the objects committed to it, and neither sovereign, with respect to the objects committed to the other. **We cannot comprehend that train of reasoning, which would maintain, that the extent of power granted by the people is to be ascertained, not by the nature and terms of the grant, but by its date**. Some state constitutions were formed before, some since that of the United States. We cannot believe, that their relation to each other is in any degree dependent upon this circumstance. Their respective powers must, we think, be precisely the same, as if they had been formed at the same time. (emphasis added)

This federal system was not a mere whim of the Founding Fathers, but rather a system conceived so that, through the balance of power between the

federal government and the state governments, the most basic liberties would be protected. *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985). Additionally, this system promotes decentralized governments that are more attuned to the diverse needs of a heterogeneous society, increases opportunity for the people to get involved in the democratic process, allows for greater innovation and experimentations in the government, and makes the governments more responsive because they will have to compete for a mobile population. *See* McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. Chi. L. Rev. 1484, 1491 1511 (1987); Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1, 3-10 (1988).

The spheres of action of those two entities often create friction between what each of them can or cannot do. *Gregory v. Ashcroft, supra*, at 461. In order to address certain concerns that could arise within the criminal justice systems coexisting in the United States, the U.S. Supreme Court created the doctrine of dual sovereignty.

A. The doctrine of dual sovereignty

The doctrine of dual sovereignty is an exception to the application of the protection against double jeopardy. Under that doctrine, if two separate sovereign entities criminally prosecute a person for the same offense, the constitutional protection against double jeopardy is not triggered. Hollander, Bergman and Stephenson, *Wharton's Criminal Procedure*, 13th ed., New York, Lawyers Cooperative, 2010, Vol. 3 § 13:12 ("The Fifth Amendment's Double

Jeopardy Clause is not violated by multiple prosecutions for the same offense when those prosecutions are undertaken by separate sovereigns.").

The U.S. Supreme Court applied the doctrine of dual sovereignty for the first time in *United States v. Lanza*, 260 U.S. 377 (1922).[3] In that case, certain people were charged in federal court with manufacturing, transporting and possessing intoxicating liquors in violation of the National Prohibition Act. The defendants argued that a state court in Washington had sentenced them for the same offense for which they were being prosecuted in federal court, and they argued that this constituted double jeopardy. The federal lower court accepted the arguments and dismissed the charges. The Supreme Court eventually reversed that decision

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[3] The controversy was not new; although it had not been resolved definitively, it had been recognized in previous cases. *See, e.g., Moore v. Illinois*, 55 U.S. 13, 20 (1852) ("An offence, in its legal signification, means the transgression of a law... Every citizen of the United States is also a citizen of a State or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offence or transgression of the laws of both... That either or both may (if they see fit) punish such an offender, cannot be doubted. Yet it cannot be truly averred that the offender has been twice punished for the same offence; but only that by one act he has committed two offences, for each of which he is justly punishable."). *See also Cross v. North Carolina*, 132 U.S. 131 (1889); *United States v. Marygold*, 50 U.S. 257 (1850); *Fox v. Ohio*, 46 U.S. 410 (1850).

and declared that they were two actions by two different sovereigns:

> We have here two sovereignties, **deriving power from different sources**, capable of dealing with the same subject-matter within the same territory. Each may, without interference by the other, enact laws to secure prohibition, with the limitation that no legislation can give validity to acts prohibited by the amendment. Each government in determining what shall be an offense against its peace and dignity **is exercising its own sovereignty, not that of the other**. *Id.* at 382 (emphasis added).

It concluded that an action defined as an offense at the federal and state levels is an offense against the peace and dignity of both sovereigns and can be punishable by federal court or by the state court, or by both. The defendants committed two different offenses in a single act; one against the peace and dignity of the State of Washington and another against the United States. That did not constitute double jeopardy. *Id.* at 382.[4]

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[4] The English-language text reads: "It follows that an act denounced as a crime by both national state sovereignties is an offense against the peace and dignity of both and may be punished by each .... The defendants thus committed two different offenses by the same act, and a conviction by a court of

Later, the U.S. Supreme Court reaffirmed the doctrine of dual sovereignty in two cases decided on the same day: *Bartkus v. Illinois*, 359 U.S. 121 (1959) and *Abbate v. United States*, 359 U.S. 187 (1959). In the first, it was ruled that acquittal in federal court did not prevent a second criminal prosecution for the same offenses in state court.[5] *Wharton's Criminal Procedure, op. cit.*, Sec. 13:12. On the other hand, in *Abbate v. United States, supra*, the U.S. Supreme Court faced the opposite situation and held that the doctrine of dual sovereignty allows for a person to be indicted in federal court, even if he or she has been convicted in state court. *See* LaFave, Israel, King and Kerr, *Criminal Procedure*, 3d ed., Minnesota, Ed. West Publishing Co., 2007, Vol. 3, Sec. 25.5 (a).

Washington of the offense against that state is not a conviction of the different offense against the United States, and so is not double jeopardy."

[5] The court invoked the due process clause of the Fourteenth Amendment, because at that time the protection against double jeopardy provided by the Fifth Amendment did not apply to the States. *Palko v. Connecticut*, 302 U.S. 319 (1937). That is why a large part of the discussion in that case is centered on whether the alleged act infringed the due process of law ("With this body of precedent as irrefutable evidence that state and federal courts have for years refused to bar a second trial even though there had been a prior trial by another government for a similar offense, it would be disregard of a long, unbroken, unquestioned course of impressive adjudication for the Court now to rule that due process compels such a bar."). *Bartkus v. Illinois, supra*, at 136. In *Benton v. Maryland*, 395 U.S. 784 (1969), the protection against double jeopardy provided by the Fifth Amendment was finally applied to the states.

The Supreme Court expressly declined to overrule *United States v. Lanza, supra*, and stated the following: "[I]f the States are free to prosecute criminal acts violating their laws, and the resultant state prosecutions bar federal prosecutions based on the same acts, federal law enforcement must necessarily be hindered." *Abbate v. United States, supra*, at 671.

In *United States v. Wheeler*, 435 U.S. 313 (1978), the U.S. Supreme Court explained in detail the foundations of the doctrine of dual sovereignty. In that case, the Navajo tribe accused one of its members, in a tribal court, of disorderly conduct. The tribal court sentenced him. One year later, a federal grand jury in the State of Arizona indicted him for related acts. The defendant alleged that the prosecution in the tribal court prevented the second prosecution in federal court. The federal court dismissed the charges. The Supreme Court ruled that Native-American tribes, for purposes of the double jeopardy clause, were separate sovereigns from the United States, so that the person could also be charged in federal court.

The Supreme Court framed the dispute as follows: "the controlling question in this case is the source of this power to punish tribal offenders." *Id.* at 322. Thus, the Supreme Court assessed whether that power to punish the offenders arose from any inherent sovereignty or if it was the exercise of the

sovereignty of the federal government by delegation of Congress.[6] *Id.*

The Court held that Native-American tribes in the United States have an original inherent sovereignty that existed prior to the arrival of the Europeans to the New World. *Id.* Upon incorporation to the territory of the United States, the tribes were stripped of certain attributes of their original sovereignty, but retained others. *Id.* The authority to punish offenders was one of those attributes that the tribes did not surrender to the United States Congress. *Id.* For that reason, the Supreme Court concluded that "when the Navajo Tribe exercises this power, it does so as part of the sovereignty retained and not as an arm of the Federal Government." *Id.* at 328. *See also* D.S. Rudstein, *Double Jeopardy: A Reference Guide to the United States Constitution*, Connecticut, Praeger Publishers, 2004, at 87

That case shows that, for the U.S. Supreme Court, what is crucial is not whether the entity has its own government or the power to enact a criminal code or the authority to charge people for violations of its laws. Rather, the determining factor for the doctrine of dual sovereignty to apply, is the ultimate source of the power under which the indictments were undertaken ("[T]he ultimate source of the

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[6] ("Is it a part of inherent tribal sovereignty, or an aspect of the sovereignty of the Federal Government which has been delegated to the tribes by Congress?"). *United States v. Wheeler, supra*, at 322.

power under which the respective prosecutions were undertaken."). *United States v. Wheeler, supra*, at 320 (emphasis added). If it is a power delegated by Congress, the doctrine of dual sovereignty does not apply.

That is precisely the analysis that the U.S. Supreme Court has used repeatedly to resolve this type of case. The use of the word "sovereignty" in other contexts and for other purposes is irrelevant in solving the controversy at bar. For a more comprehensive study, *see* Z.S. Price, *Dividing Sovereignty in Tribal and Territorial Criminal Jurisdiction*, 113 Colum. L. Rev. 657 (2013).

Likewise, in *Heath v. Alabama*, 474 U.S. 82 (1985), the U.S. Supreme Court applied the doctrine of dual sovereignty to criminal prosecutions for the same offense in two different states. *Wharton's Criminal Procedure, op. cit.* § 13:12. In that case, the Court upheld an indictment by a grand jury of the State of Alabama against a person who had been convicted in Georgia based upon the same facts. The Court reaffirmed the analysis in *United States v. Wheeler, supra*, at 320 and held that in applying the dual sovereignty doctrine, the crucial determination is whether the two entities draw their authority to punish the offender from distinct sources of power. *Heath v. Alabama, supra*, at 88 ("In applying the dual sovereignty doctrine, then, the crucial determination is whether [...] **the two entities draw their authority to punish the offender from distinct sources of power.**") (emphasis

added). *See also Wharton's Criminal Procedure, op. cit.* § 13:12.

The Supreme Court held that the states are separate sovereigns from the federal government, given that their powers to undertake criminal prosecutions derive from separate and independent sources of authority originally belonging to them before admission to the Union and preserved to them by the Tenth Amendment. *Heath v. Alabama, supra,* at 89 ("Their powers to undertake criminal prosecutions derive from separate and independent sources of power and authority originally belonging to them before admission to the Union and preserved to them by the Tenth Amendment.").

In *United States v. Lara,* 541 U.S. 193 (2004), the U.S. Supreme Court again addressed a controversy related to Native-American tribes. In this case, a tribe judged a Native-American that, contrary to *United States v. Wheeler, supra,* was not one of its members. Subsequently, a federal court prosecuted him for the same offense. In order to determine whether the second prosecution was in violation of the double jeopardy clause, the Supreme Court stated that the main question was whether the source of the power to punish someone who was not a member of the tribe derived from inherent tribal sovereignty or whether it was a power delegated by the federal government. *Id.* at 199 ("What is 'the source of [the] power' to punish nonmember Indian offenders, 'inherent tribal sovereignty' or delegated federal authority?") (emphasis in original).

The problem in that case was that the Supreme Court had ruled in *Duro v. Reina*, 495 U.S. 676, 691-92 (1990), that tribes did not possess sovereign authority to criminally prosecute Indian persons also were not members of the prosecuting tribe. Nevertheless, in reaction to the ruling in *Duro v. Reina, supra*, Congress passed new legislation recognizing and asserting the inherent power of Indian tribes to prosecute Native American people regardless of whether they belonged to the same tribe or not. *See* 25 U.S.C. § 1301 ("means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise... criminal jurisdiction over all Indians.").

The Supreme Court ruled that in allowing the aforementioned to the tribes, Congress did not delegate authority belonging to the federal government, but it rather recognized authority that the tribes possessed as sovereigns. *United States v. Lara, supra*, at 209 ("[T]he Constitution authorizes Congress to permit tribes, as an exercise of their inherent tribal authority, to prosecute nonmember Indians."). *See also United States v. Wheeler, supra.* In other words, Congress, through legislation, can recognize additional attributes appurtenant to an entity that already possesses prior sovereignty. *United States v. Lara, supra*, at 207 ("Congress has enacted a new statute, relaxing restrictions on the bounds of the inherent tribal authority that the United States recognizes."). This case shows that the fact that Congress may add, remove or modify said attributes is not relevant in determining what is the tribe's ultimate source of power. For that reason, the

Court applied the doctrine of dual sovereignty and found that there had been no violation of the right against double jeopardy.

B. Situations in which the doctrine of dual sovereignty has not been applied

The U.S. Supreme Court has refused to apply the doctrine of dual sovereignty in certain cases where the different entities carry out multiple prosecutions for the same offenses. In these cases, the U.S. Supreme Court has ruled that although the entities are nominally different, they derive their authority to prosecute from the same source. *Heath v. Alabaman, supra*, at 90 ("In those instances where the Court has found the dual sovereignty doctrine inapplicable, it has done so because the two prosecuting entities did not derive their powers to prosecute from independent sources of authority.").

In *Grafton v. United States*, 206 U.S. 333 (1907), the Court found that a territory of the United States is not a sovereign for purposes of the clause against double jeopardy. It reasoned that the government of a territory owes its existence wholly to the federal government, and its tribunals exert all of their powers by authority of the United States. *Id.* at 354 ("[O]wes its existence wholly to the United States, and its judicial tribunals exert all their powers by authority of the United States."). In other words, a territorial court and a federal court exercise the authority of the same sovereign: the United States. *Id.* at 355 ("the two tribunals that tried the accused exert all their powers under and by authority of the same government,—that of the United States."). *See*

also Rudstein, *op. cit.*, at 88. For that reason, successive prosecutions between a federal court and a court of a territory constitute double jeopardy. *See also United States v. Wheeler, supra*, at 321 ("City and State, or **Territory and Nation, are not two separate sovereigns** [...] but one alone. And the "dual sovereignty" concept [...] does not permit a single sovereign to impose multiple punishments for a single offense merely by the expedient of establishing multiple political subdivisions with the power to punish crimes.") (emphasis added).

Of particular importance to us, in *Puerto Rico v. Shell Co.*, 302 U.S. 253 (1937), the U.S. Supreme Court applied to Puerto Rico the rule established in *Grafton v. United States, supra.* Specifically, the U.S. Supreme Court stated that Puerto Rico, being a territory of the United States, is not a sovereign for purposes of the double jeopardy clause. In that case, a Puerto Rico prosecutor accused a company of violating local antitrust laws. The defendants claimed that the local laws were null and void because Congress had preempted them with the Sherman Act. Initially, we ruled in favor of the defendants. *See Pueblo v. The Shell Co. Ltd.*, 49 P.R. Dec. 226 (1935). However, the U.S. Supreme Court reversed our ruling and concluded that the antitrust laws passed by the Puerto Rico legislature were valid.

The controversy regarding the double jeopardy clause arose from allegations by the defendant company. The company, which had not been previously prosecuted, claimed that if the Court

upheld the validity of the state antitrust law, it would be placing the defendant company at risk of being punished twice for the same offenses, that is, first in the Puerto Rico courts under local law and a second time in federal court under the federal antitrust law. The U.S. Supreme Court concluded that such risk was not present, inasmuch as the territory's power to legislate was derived from the same source as that of the United States. Thus, it stated as follows:

> It likewise is clear that the legislative duplication gives rise to no danger of a second prosecution and conviction, or of double punishment for the same offense. The risk of double jeopardy does not exist. Both the territorial and federal laws and the courts, whether exercising federal or local jurisdiction, are creations emanating from the same sovereignty. Prosecution under one of the laws in the appropriate court, necessarily, will bar a prosecution under the other law in another court. *Puerto Rico v. Shell Co., supra*, at 264 (citations omitted).

The Supreme Court has also refused to extend the doctrine of dual sovereignty to municipalities. *Waller v. Florida*, 397 U.S. 387 (1970). *See also* LaFave, Israel, King and Kerr, *op. cit.*, Vol. 3, Sec. 25.5 (c). Municipalities are not sovereign entities; rather, they are subordinate entities of the government, created by the state to assist in its

government functions. *Waller v. Florida, supra*, at 392, citing *Reynolds v. Sims*, 377 U.S. 533, 575 (1964).[7] The Court analyzed the controversy in the following way:

> [T]he apt analogy to the relationship between municipal and state governments is to be found in the relationship between the government of a Territory and the Government of the United States. **The legal consequence of that relationship was settled in *Grafton v. United States*, ... [*supra*] where this Court held that a prosecution in a court of the United States is a bar to a subsequent prosecution in a territorial court,** since both are arms of the same sovereign. *Waller v. Florida, supra*, at 393 (emphasis added).

In *Government of the Virgin Islands v. Dowling*, 633 F.2d 660, 667 (3rd Cir. 1980), *cert. denied*, 449 U.S. 960 (1980), the Court of Appeals for the Third Circuit asserted that the Territory of the U.S. Virgin Islands and the United States Government constitute a single sovereignty for purposes of the clause against double jeopardy. *Id.* at 669. In

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[7] It is true that some have advocated for a more practical focus instead of the "sovereignty" criterion. *See, e.g., Price, supra*. But the truth is that the U.S. Supreme Court has never abandoned the ultimate source of power criterion.

keeping with that statement, the court of appeals concluded that the accused could not be declared guilty of the same offense both under the federal jurisdiction and under the jurisdiction of the Virgin Islands. *See Blockburger v. United States, supra*, at 304. Specifically, it was said that it cannot be concluded that the U.S. Virgin Islands have a sovereignty separate and independent from that of the United States Government. *See also Government of Virgin Islands v. Brathwaite*, 782 F.2d 399, 406 (3rd Cir. 1986). Note that this is nothing more that the application of the rule already established in *Grafton v. United States, supra*, and reaffirmed in *Puerto Rico v. Shell Co., supra.*

The case of the Commonwealth of the Northern Mariana Islands, although it has not been resolved definitively by a court with jurisdiction, seems to be the same. The federal law that regulates its relationship to the federal government establishes that the Mariana Islands are an unincorporated territory of the United States. *Saipan Stevedore Co. Inc. v. Director, Office of Workers' Compensation Programs*, 133 F.3d 717 (9th Cir. 1998) ("The Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America ("Covenant"), ratified by Congress by joint resolution, established the Commonwealth as a unincorporated territory of the United States."). In other words, the government of the Northern Mariana Islands, in accordance with the doctrine of dual sovereignty outlined by the

Supreme Court, is not a separate sovereign from the federal government.[8] Guam's case seems to be similar. *See United States v. Carriage*, 117 F.3d 1426 (9th Cir. 1997) (No. 96-10427) (unpublished) ("The government concedes that Guam and the federal government are a single sovereign.").[9]

Regarding Washington D.C., other courts have found that, in accordance with the constitutional clause prohibiting double jeopardy, an individual cannot be punished for the same offense typified both

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[8] But see the unpublished judgment of the Court for the District of the Northern Mariana Islands, *United States ex rel. Richards v. De Leon Guerrero*, Misc. No. 92000001 ((D. N. Mar. I. 1992), *aff'd*, 4 F.3d 749 (9th Cir. 1993) ("For purposes of criminal double jeopardy, the federal courts, state [and Commonwealth of the Northern Mariana Islands] courts, and courts martial are considered courts of separate 'sovereigns'."). This unpublished judgment is not in keeping with the ruling of the U.S. Supreme Court in *Grafton v. United States, supra*, and *Puerto Rico v. Shell Co., supra*. That is why we are not persuaded by the cited dictum.

[9] *See* 48 U.S.C. § 1704 ("A judgment of conviction or acquittal on the merits under the laws of Guam, the Virgin Islands or American Samoa shall be a bar to any prosecution under the criminal laws of the United States for the same act or acts, and a judgment of conviction or acquittal on the merits under the laws of the United States shall be a bar to any prosecution under the laws of Guam, the Virgin Islands, or American Samoa for the same act or acts.") The fact that Puerto Rico is not mentioned in that law in no way means that, as a territory, the doctrine of dual sovereignty does not apply to it. The doctrine of dual sovereignty is a constitutional matter over which the pronouncements of the U.S. Supreme Court have precedence.

in a federal law and in the Penal Code of the District of Columbia, because both codes are approved by Congress. *See United States v. Sumler*, 136 F.3d 188, 191 (D.C. Cir. 1998); *United States v. Weathers*, 186 F.3d 948, 951 n.3 (D.C. Cir. 1999).

IV

A. The doctrine of dual sovereignty and the Commonwealth of Puerto Rico, according to federal courts

In *United States v. López Andino*, 831 F.2d 1164 (1st Cir. 1987), the First Circuit Court of Appeals faced the controversy of whether the Commonwealth of Puerto Rico was a sovereign for purposes of the doctrine of dual sovereignty. There, Mr. Luis López Andino and Mr. Israel Méndez Santiago were convicted of several offenses in the United States District Court for the District of Puerto Rico. As relevant here, the convicted defendants argued that their convictions in said federal forum were invalid because they had already been prosecuted for the same offenses under Puerto Rico law. *United States v. Lopez Andino, supra*, at 1167. For that reason, they alleged that the federal constitutional clause barring double jeopardy in criminal proceedings applied. U.S. Const. amend. V, *supra*.

The Court of Appeals for the First Circuit concluded that the Puerto Rico [Federal] Relations Act and the creation of the Constitution of the Commonwealth of Puerto Rico altered the relationship between Puerto Rico and the United States. *United States v. López Andino, supra*, at

1168. To said court, Puerto Rico became a sovereign for purposes of the dual sovereignty doctrine. *Id.*

Judge Torruella concurred in the result, believing that the offenses charged in the Puerto Rico courts **were different** than the offenses charged in the Federal District Court. *Id.* at 1172-77 That made the clause against double jeopardy inapplicable in the criminal sphere. However, Judge Torruella opined that Puerto Rico currently continues to be a territory of the United States and, therefore, the doctrine of dual sovereignty does not apply to it.

The Court of Appeals for the Eleventh Circuit faced the same controversy in *United States v. Sánchez*, 992 F.2d 1143 (11th Cir. 1993), *cert. denied*, 510 U.S. 1110 (1994). Contrary to the First Circuit, the Court of Appeals for the Eleventh Circuit concluded that Puerto Rico is a territory of the United States for purposes of Art. IV, Sec. 3 of the Constitution of the United States, P.R. Laws Ann. Vol. I, and not a separate sovereign. In that case, Mr. Rafael Sánchez and Mr. Luis Sánchez were prosecuted in a Federal District Court in Florida. The defendants alleged that they had already been prosecuted for the same offenses in the Puerto Rico General Court of Justice.

In an exercise of intellectual honesty, the Court of Appeals cited the ruling in *Puerto Rico v. Shell Co., supra*, approvingly, and concluded that that was the precedent that should be followed. It immediately discussed why the establishment of the Constitution of the Commonwealth of Puerto Rico did not alter the ruling in *Puerto Rico v. Shell Co., supra.* In

particular, the court held that in *United States v. Wheeler, supra*, decided 25 years after the establishment of the Commonwealth of Puerto Rico, the U.S. Supreme Court used *Puerto Rico v. Shell Co., supra*, to distinguish between the dependent status of a territory and the separate and sovereign status of the Native-American tribes. It also held that the development of the Commonwealth of Puerto Rico had not granted our courts a source of punitive authority derived from an inherent sovereignty. *United States v. Sánchez, supra*, at 1152.

After that study, the Court of Appeals for the Eleventh Circuit analyzed the offenses charged and determined that the clause barring double jeopardy prevented prosecution for one of the offenses charged (murder for hire), 18 U.S.C. § 1958, because the defendants had been prosecuted for an identical offense in the Puerto Rico courts. *United States v. Sánchez, supra*, at 1159.

B. The dual sovereignty controversy before the Puerto Rico Supreme Court

Finally, in *Pueblo v. Castro García, supra*, this Court adopted the view of the court of Appeals for the First Circuit and held that the Commonwealth of Puerto Rico was a sovereign for purposes of the double jeopardy clause. *See* J. J. Álvarez González, *Derecho Constitucional de Puerto Rico y Relaciones Constitucionales con los Estados Unidos*, Bogotá, Editorial Temis S.A., 2009, at 536-537. We specifically stated that "the power of the Commonwealth of Puerto Rico to create and enforce

offenses emanates, not only from Congress, but also from the consent of the People and, therefore, from itself, so the doctrine of dual sovereignty applies to it." *Id.* at 779-81. Associate Judge Mr. Rebollo López issued a dissenting opinion in which, in summary, he argued that Puerto Rico is not a sovereign, but rather, under the constitutional scheme of the United States, it is a territory subject to the legislative power of Congress, as established by the territorial clause of Art. IV, Sec. 3 of the United States Constitution.

This Court relied on two main premises in conclude that the doctrine of dual sovereignty applies to the Commonwealth of Puerto Rico. First, after studying all of the caselaw on the matter, the court applied a reasoning that the U.S. Supreme Court has never used. On that occasion, we reiterated once and again that the Commonwealth of Puerto Rico enjoys a degree of sovereignty equal to that of the states of the Union and, therefore, the doctrine of dual sovereignty should be applied to it. *See, e.g., Pueblo v. Castro García, supra*, at 765 ("Puerto Rico obtained a similar sovereignty to that of the states of the Union in extremely basic aspects."). *See also id.* at 769-71, 773, 775-76.

The second premise that we used in *Pueblo v. Castro García, supra*, is that after the enactment of the Constitution of the Commonwealth of Puerto Rico in 1952, "the political power of the island emanates from the consent and will of the People of Puerto Rico." *Id.* at 765. For that reason, it was concluded that, after 1952, Puerto Rico is in a legal

and political situation very different from the situation when the U.S. Supreme Court decided the case of *Puerto Rico v. Shell Co., supra. See Pueblo v. Castro García, supra*, at 778-79.

The petitioners in the present case ask us to overrule *Pueblo v. Castro García, supra*, and hold the doctrine of dual sovereignty inapplicable to Puerto Rico. After analyzing the controversy, we conclude that the petitioners are right. The grounds used by this Court on that occasion are wrong from a strictly legal point of view. It is now our duty to analyze whether in 1952 Puerto Rico acquired an original sovereignty or an independent sovereignty from that of Congress—a sovereignty granted, not delegated—that makes the 1937 ruling in *Puerto Rico v. Shell Co., supra*, inapplicable today.

V

A. Puerto Rico and the territorial clause of the Constitution of the United States

Contrary to Native-American tribes or to the states of the Union, Puerto Rico has never exercised an original or primary sovereignty In order to end the Spanish-American War of 1898, through the Treaty of Paris, Spain ceded the island of Puerto Rico to the United States, as well as others that were under its sovereignty in the West Indies and the Pacific. Art. II, Treaty of Paris, P.R. Laws Ann., Vol. 1. *See also* J. Trías Monge, *Historia Constitucional de Puerto Rico*, Rio Piedras, Ed. UPR, 1980, Vol. I, at 144-48. It was specified that "the civil rights and the political status of the inhabitants of ..." Puerto Rico

would be determined by the United States Congress. Art. IX of the Treaty of Paris, *supra*.

In 1900, after two years of military government, a civil government was established in Puerto Rico by means of the Organic Charter of April 12, 1900, known as the Foraker Act. P.R. Laws Ann., Vol. 1. This congressional statute provided for a governor appointed by the President of the United States, a bicameral legislature, a supreme court and other tax-related matters.

The controversy regarding the constitutional validity of the acquisition of Puerto Rico and other possessions quickly reached the United States Supreme Court. J.R. Torruella, *The Insular Cases: The Establishment of a Regime of Political Apartheid*, 77 Rev. Jur. UPR 1 (2007). On the same day, May 27, 1901, the Court decided several cases involving different controversies regarding the possession and administration of the new territories. *See The Diamond Rings*, 183 U.S. 176 (1901); *Huus v. New York & Porto Rico S.S. Co.*, 182 U.S. 392 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *Dooley v. United States*, 182 U.S. 221 (1901); *Goetze v. United States*, 182 U.S. 221 (1901); *Dooley v. United States*, 183 U.S. 151 (1901); *De Lima v. Bidwell*, 182 U.S. 1 (1901). Of these cases, which later became known as the Insular Cases, the most important one is *Downes v. Bidwell, supra*. *See* Alvarez González, *op. cit.*, at 388.

In *Downes v. Bidwell, supra*, the constitutional validity of one of the sections of the Foraker Act

establishing an excise tax barrier between United States and Puerto Rico commerce was questioned. Alvarez González, *op. cit.*, at 388. The plaintiffs alleged that the tax breached the Uniformity Clause of the Constitution. C. Duffy Burnett & A. I. Cepeda Derieux, *Los casos insulares: Doctrina desanexionista,* 78 Rev. Jur. UPR 661, 667 (2009). That clause states: "all Duties, Imposts and Excises shall be uniform throughout the United States." U.S. Const. Art. I § 8, P.R. Laws Ann., Vol. I. The Supreme Court, without being able to come up with an opinion endorsed by a majority of the justices, ruled in favor of the validity of the tax. *Downes v. Bidwell, supra,* at 287.

The Court concluded that Puerto Rico is a territory that belongs to the United States but is not part of the phrase "United States" for purposes of Art. 1, Sec. 8 of the Constitution of the United States. *Id. See also* E. Rivera Ramos, *The Legal Construction of Identity: The Judicial and Social Legacy of American Colonialism in Puerto Rico,* Baltimore, American Psychological Association, 2001, at 80. According to Justice Brown, the power to acquire territories included the power to govern them, to establish the terms under which their inhabitants would be received and what their status would be. Those plenary powers over the territories would be subject to fundamental limitations in favor of personal rights. *Downes v. Bidwell, supra,* at 780.

Justice White issued a concurring opinion and outlined the theory that would later become the definitive legal rule for territories: the doctrine of

incorporation. J.R. Torruella, *The Supreme Court and Puerto Rico: The Doctrine of Separate & Unequal*, Río Piedras, Ed. UPR, 1985, at 53. Justice White agreed that Congress has plenary powers over the territories and that those powers are subject to certain basic principles that, although not expressed in the Constitution, could not be transgressed. *Downes v. Bidwell, supra*, at 289-90.[10]

However, Justice White proposed that when a constitutional clause is invoked, the fundamental question is not whether the Constitution operates *ex proprio vigore*, but whether the invoked clause is applicable to that territory in particular.[11] *Id.* at

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[10] The original text reads: "The Constitution has undoubtedly conferred on Congress the right to create such municipal organizations as it may deem best for all the territories of the United States, whether they have been incorporated or not, to give to the inhabitants as respects the local governments such degree of representation as may be conducive to the public well-being, to deprive such territory of representative government if it is considered just to do so, and to change such local governments at discretion." *Id.* at 289-90. Justice White also stated: "While, therefore, there is no express or implied limitation on Congress in exercising its power to create local governments for any and all of the territories, by which that body is restrained from the widest latitude of discretion, it does not follow that there may not be inherent, although unexpressed, principles which are the basis of all free government which cannot be with impunity transcended." *Id.* at 290-91.

[11] "In the case of the territories, as in every other instance, when a provision of the Constitution is invoked, the question which arises is, not whether the Constitution is operative, for

292. The applicability of the clauses would depend, then, on the particular status of the territory and its relationship with the United States.[12]

Justice White stated that in order to determine whether the uniformity clause applied to Puerto Rico, it must be determined whether Puerto Rico had been incorporated to the United States and had become an integral part of the same, as stated in the Constitution. He concluded that, based on the terms of the Treaty of Paris, Puerto Rico had not been incorporated to the United States. Therefore, only those constitutional provisions that were considered basic or fundamental applied to Puerto Rico.

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that is self-evident, but whether the provision relied on is applicable." *Id.* at 292.

[12] *See* Duffy Burnett & Cepeda Derieux, *supra*, at 667-68 ("According to Judge White, some of the territories subject to the sovereignty of the United States had been incorporated into the nation and were already, at that time, an integral part of the United States. Other territories had been annexed to the United States but had not been formally incorporated; they simply belonged to the United States or, in White's own words, were 'appurtenant thereto as possessions'. White described those territories as 'foreign to the United States in a domestic sense'. Eventually, those territories acquired the not-so-elegant title of "unincorporated territories.") However, Justice White clarified that, to all other nations, as a matter of international law, Puerto Rico is not a foreign country, but is part of the United States ("in an international sense Porto Rico was not a foreign country, since it was subject to the sovereignty of and was owned by the United States."). *Downes v. Bidwell, supra*, at 341.

From 1903 to 1914, the U.S. Supreme Court decided another series of cases dealing with different matters of the territories. *See Ocampo v. United States*, 234 U.S. 91 (1914); *Ochoa v. Hernández*, 230 U.S. 139 (1913); *Dowdell v. United States*, 221 U.S. 325 (1911); *Kopel v. Bingham*, 211 U.S. 468 (1909); *Kent v. Porto Rico*, 207 U.S. 113 (1907); *Trono v. United States*, 199 U.S. 521 (1905); *Rasmussen v. United States*, 197 U.S. 516 (1905); *Dorr v. United States*, 195 U.S. 158 (1904); *Kepner v. United States*, 195 U.S. 158 (1904); *González v. Williams*, 192 U.S. 1 (1904); *Hawaii v. Mankichi*, 190 U.S. 197 (1903). *See* Rivera Ramos, *op. cit.* at 75. During that period, a ruling was made in *Grafton v. United States, supra*, establishing the rule that was previously discussed, stating that a territory is not a sovereign for purposes of the constitutional clause against double jeopardy ("a territorial government is entirely the creation of Congress, 'and its judicial tribunals exert all their powers by authority of the United States' "). *See also United States v. Wheeler, supra*, at 322.

In 1917, the United States Congress enacted a new Organic Charter known as the Jones-Shafroth Act, 1 P.R. Laws Ann. See Trías Monge, *op. cit.*, Vol. II, at 88. The most important change brought about by said law was that it granted United States citizenship to Puerto Ricans. That forced the U.S. Supreme Court to determine whether the grant of American citizenship to Puerto Ricans was the equivalent of incorporating Puerto Rico.

In *Balzac v. Porto Rico*, 258 U.S. 298 (1922), a person was sentenced to nine months in prison for

making certain comments against the governor that were considered libelous. The defendant alleged that, under the Sixth Amendment to the U.S. Constitution, he had the right to a trial by jury. The Supreme Court rejected that argument.

The Supreme Court unanimously adopted Judge White's theory of territorial incorporation and stated that the right to trial by jury did not apply to those territories that had not been incorporated into the Union.[13] The Supreme Court then proceeded to analyze whether the Jones Act finally incorporated Puerto Rico. Its answer was no.

Among other things, it concluded that if Congress had intended to incorporate the territory it would have clearly stated its intention to do so and would not have left it up to mere inference. *Balzac v. Porto Rico, supra*, at 306 ("Had Congress intended to take the important step of changing the treaty status of Porto Rico by incorporating it into the Union, it is reasonable to suppose that it would have done so by the plain declaration, and would not have left it to mere inference.").

Many scholars on the subject summarize the doctrine on Puerto Rico in the following way: "The

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[13] In *Pueblo v. Santana Vélez*, 177 P.R. Dec. 61 (2009), we concluded, citing Professor Alvarez González, that notwithstanding the ruling in *Balzac*, " '[s]ince *Duncan v. Louisiana*, 391 U.S. 145 (1968), determined that [the right to trial by jury] is 'basic' and, as such, applicable to the states... it seems reasonable to conclude that said right applies to Puerto Rico under the doctrine of territorial incorporation."

Constitution applies in its entirety within the United States (if said phrase is defined to include only the states of the Union, Washington D.C., and the incorporated territories), while in the unincorporated territories only the basic provisions of the Constitution apply." Duffy Burnett & Cepeda Derieux, *supra*, at 667-668.

Despite the criticism of its disdainful and contemptuous tone towards the inhabitants of the territories, and of the obsolescence of much of the holdings of the Insular Cases, the core part of the doctrine has continued to be used. *See, e.g., Boumediene v. Bush*, 553 U.S. 723, 759 (2008) ("the Court devised in the Insular Cases a doctrine that allowed it to use its power sparingly and where it would be most needed. This century-old doctrine informs our analysis in the present matter."); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 268 (1990) ("The global view taken by the Court of Appeals of the application of the Constitution is also contrary to this Court's decisions in the Insular Cases, which held that not every constitutional provision applies to governmental activity even where the United States has sovereign power."). For a discussion about these last cases, *see* G.A. Gelpí, *Los casos insulares: Un estudio histórico comparativo de Puerto Rico, Hawái y las Islas Filipinas*, 45 Rev. Jur. U. Inter. P.R. 215, 223-224 (2011) ("In light of *Boumediene*, in the future, the Supreme Court will have to reexamine the doctrine of the Insular Cases with regards to its application to Puerto Rico and other territories of the U.S."); C. Saavedra Gutiérrez, *Incorporación de jure o incorporación de facto: Dos*

propuestas para erradicar fantasmas constitucionales, 80 Rev. Jur. UPR 967, 981 (2011) ("with respect to the territories, the doctrine of the insular cases has not emerged intact from the constant constitutional attacks that it suffered during the Twentieth century.").

B. The status of Puerto Rico after the enactment of the Constitution of the Commonwealth of Puerto Rico

After many years during which different sectors demanded greater autonomy for Puerto Rico over its internal affairs, on March 13, 1950, a bill was presented to Congress to enable the adoption of a constitution. Trías Monge, *op. cit.*, Vol. III, at 40. Said bill later became Public Law 600, 48 U.S.C. § 731b *et seq.* The legislative history clearly reveals that the adoption of that constitution did not represent a change in the territorial status of Puerto Rico.

During the hearings in Congress before the Committee on Public Lands of the House of Representatives, the then-Governor of Puerto Rico, Luis Muñoz Marín, stated the following:

> You know, of course, that if the people of Puerto Rico should go crazy, Congress can always get around and legislate again. But I am confident that the Puerto Ricans will not do that, and invite congressional legislation that would take back something that was given to the people of Puerto Rico as good United

> States citizens. A. Leibowitz, *The Commonwealth of Puerto Rico: Trying to Gain Dignity and Maintain Culture*, 17 Rev. Jur. U. Inter. P.R. 1, 23 (1982), citing *Puerto Rico Constitution: Hearings on H.R. 7674 and S. 3336 Before the House Comm. on Public Lands*, 81st Cong., 1st & 2nd Sess. 63 (1949-1950).

Antonio Fernós Isern, then-Resident Commissioner of Puerto Rico in Washington D.C., stated, in the same line, the following:

> As already pointed out, H.R. 7674 would not change the status of the island of Puerto Rico relative to the United States. It would not commit the United States for or against any specific future form of political formula for the people of Puerto Rico. It would not alter the powers of sovereignty acquired by the United States over Puerto Rico under the terms of the Treaty of Paris. Leibowitz, *supra*, 23. *See also Pueblo v. Castro García, supra*, at 790 (Dissenting opinion of Associate Judge Mr. Rebollo López).

Mr. Fernós Isern added:

> I would like to make two comments: One, the road to the courts would always be open to anybody who found that an amendment to the constitution

> went beyond the framework laid down by Congress; and, secondly, the authority of the Government of the United States, of the Congress, to legislate in case of need would always be there. Trías Monge, *op. cit.*, Vol. III, at 45.

The report by the Secretary of the Interior also established clearly that there would be no change in the relationship between the federal government and Puerto Rico. Thus, he affirmed that:

> It is important at the outset to avoid any misunderstanding as to the nature and general scope of the proposed legislation. Let me say that enactment of S. 3336 will in no way commit the Congress to the enactment of statehood legislation for Puerto Rico in the future. Nor will it in any way preclude a future determination by the Congress of Puerto Rico's ultimate political status. The bill merely authorizes the people of Puerto Rico to adopt their own constitution and to organize a local government which, under the terms of S. 3336, would be required to be republican in form and contain the fundamental civil guaranties of a bill of rights .... The bill under consideration would not change Puerto Rico's political, social, and economic relationship to the

> United States. Leibowitz, *supra*, at 24.

Each of the reports of the U.S. House of Representatives and the U.S. Senate on the bill endorsed the views of the Department of the Interior. Thus, the reports stated the following:

> The bill under consideration would not change Puerto Rico's fundamental political, social and economic relationship to the United States .... This bill does not commit the Congress, either expressly or by implication, to the enactment o statehood legislation for Puerto Rico in the future. Nor will it in any way preclude a future determination by Congress of Puerto Rico's ultimate political status. *Id.* at 24. *See also* Trías Monge, *op. cit.*, Vol. III, at 51-54.

Both houses of Congress approved the measure and on July 3, 1950, Public Law 600 took effect. Trías Monge, *op. cit.*, Vol. III, at 56. The statute established that the [Puerto Rico] Constitution was being enacted as a new agreement that, as we will see, did not mean that Puerto Rico would cease to be a territory of the United States. The statute repealed multiple aspects of the Organic Jones-Shafroth Act of 1917 and provided for those provisions that were still in force to be cited as the Puerto Rico Federal Relations Act. Trías Monge, *op. cit.*, Vol. III, at 38. In fact, the statute kept Art. 1 of the Organic Jones-Shafroth Act of 1917 in force,

which establishes that its provisions "will apply to the Island of Puerto Rico and the adjacent islands belonging to the United States, and to the waters of said islands." Federal Relations Act, Sec. 1, 1 P.R. Laws Ann., 48 U.S.C. § 731.

Public Law 600 had to be approved by a majority of the Puerto Rico voters, which happened. Trías Monge, *op. cit.*, Vol. III, at 62. The Constitutional Convention met from September 17 to February 6, 1952. *Id.* at 78. A majority of the delegates approved the draft of the Constitution on March 3, 1952 and it was submitted for approval by Congress. *Id.* at 270-73.

The report on the ratification of the Constitution by the Commission on the Interior and Insular Affairs of the House of Representatives again repeated that the new constitution did not alter the fundamental political, social and economic relationships between the United States and Puerto Rico. Trías Monge, *op. cit.*, Vol. III, at 278-79. The report by the Senate, although it did not include such a categorical provision, also alluded to the fact that the exercise of federal authority in Puerto Rico was not affected by the Puerto Rico Constitution. *Id.* at 300.[14]

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[14] The English-language text reads: "The enforcement of the Puerto Rican Federal Relations Act and the exercise of Federal Authority in Puerto Rico under its provisions are in no way impaired by the Constitution of Puerto Rico, and may not be affected by future amendments to that constitution, or by any law of Puerto Rico adopted under its constitution."

Congress approved the [Puerto Rico] Constitution, but required the removal of Section 20 of Art. II, which established certain economic rights, and requested clarification of another provision that required attendance to public elementary schools to the extent allowed by the possibilities of the State. *Id.* Additionally, it demanded the inclusion of a section that specified that any amendment to the Constitution should be in keeping with the federal Constitution, the Puerto Rico Federal Relations Act and Public Law 600. *Id.* President Truman signed the resolution whereby the Constitution was approved. Then, the Constitutional Convention did its part. *Id.* The Constitution of the Commonwealth of Puerto Rico took force and effect on July 25, 1952. *Id.*

C. Judicial interpretation of the relationship between the Commonwealth of Puerto Rico and the federal government

The legal analysis of the relationship between the United States and Puerto Rico after the creation of the Commonwealth did not reach the U.S. Supreme Court immediately. Álvarez González, *op. cit.*, at 473. It was not until 1970 that the Court expressed itself. *Id.* Since then, the Court has tried the matter several times. *See, e.g., Examining Bd. of Engineers, Architects and Surveyors v. Flores de Otero*, 426 U.S. 572 (1976); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974). An analysis of these opinions confirms that, to the United States Supreme Court, the [Puerto Rico] Constitution did

not represent a change in the fundamental basis of the constitutional relations between Puerto Rico and the United States. The Supreme Court continued to treat Puerto Rico as a political entity subject to the territorial clause of the Constitution of the United States.

The first case that reached the U.S. Supreme Court was *Fornaris v. Ridge Tool Co.*, 400 U.S. 41 (1970). In that case, the U.S. Court of Appeals for the First Circuit concluded that a law enacted by the Puerto Rico legislature violated the Constitution of the United States, without specifying whether it violated the Fourteenth or the Fifth Amendments. The Supreme Court reversed and decided to remand the case to the Puerto Rico courts because there were no clear precedents by which to solve the dispute.

In *Calero-Toledo v. Pearson Yacht Leasing Co.*, *supra*, a person questioned the constitutional validity of a seizure made by the Puerto Rico Police without notice. Although the Court ruled on the merits in favor of the validity of the seizure, it did not specify whether the constitutional provision applicable to Puerto Rico was the Fifth Amendment or the Fourteenth Amendment to the federal Constitution.[15] *Id.* at 669 n. 5.

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[15] "Regarding the Fifth Amendment, the problem consisted in that the requirements of the due process of law apply to the states by means of the Fourteenth Amendment, while applying to the federal government and its agencies, as well as to territories and possession, by means of the Fifth Amendment."

Most of the expressions regarding the status of Puerto Rico had to do with the jurisdiction of the Supreme Court to entertain the case. The controversy was whether Puerto Rico could be considered a state for purposes of a statute that created a three-judge court (Three-Judge Court Act), 28 U.S.C. § 2281. The Court concluded that, although it had not become a state of the Union, Puerto Rico could be considered a state for purposes of that law. *Id.* at 672, citing *Mora v. Mejías*, 206 F.2d 377 (1st Cir. 1953) ("Puerto Rico has thus not become a State in the federal Union like the 48 States, but it would seem to have become a State within a common and accepted meaning of the word."). To reach that conclusion, the Court made reference, among other things, to one of the articles of Public Law 600 that states that "this Law is approved, as an agreement or compact, so that the People of Puerto Rico may organize a government based on a constitution adopted by them." *Id.* at 672 (citing *Mora v. Mejías, supra*) ("It is a political entity created by the act and with the consent of the people of Puerto Rico and joined in union with the United States of America under the terms of the compact.").

On certain occasions, an extremely broad scope has been given to that phrase that mentions a pact or covenant. *See, e.g., Ramírez de Ferrer v. Mari Brás*, 144 P.R. Dec. 141, 154-69 (1997). See, also, R. Hernández Colón, *Hacia la meta final: el nuevo*

J. Trías Monge, *El Estado Libre Asociado ante los tribunales, 1952-1954*, 64 Rev. Jur. UPR 1 (1995).

pacto-un paso adelante (J. Hernández Mayoral, P Hernández Rivera, eds.), San Juan, Ed. Calle Sol, 2011, at 8. However, it is clear today that the only thing covered by that pact or covenant to which Public Law 600 referred was that if Puerto Ricans continued the process provided therein and approved the statute, it would take effect and Congress would approve a constitution for Puerto Rico drafted by the inhabitants of the territory. Congress so clarified when it followed a similar process for the establishment of the Commonwealth of the Northern Mariana Islands. *See* S. Rep. No. 94-596, at 1 (1976) ("The essential difference between the Covenant and the usual territorial relationship... is the provision in the Covenant that the Marianas constitution and government structure will be a product of a Marianas constitutional convention, as was the case with Puerto Rico, rather than through an organic act of the United States Congress.").

That process, additionally, is similar to the process that Congress has used with other territories since the early years of the Union.[16] E. Biber, *The*

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[16] Biber, *supra*, at 125-129 ("Admission of a territory to statehood requires at least one Act of Congress (or an equivalent thereof, such as a joint resolution). The process usually begins with Congress passing an enabling act which establishes a process by which a territory can hold a constitutional convention to draft a state constitution and elections for the first state officers and Congressional representatives. An enabling act can be prompted by petitions from the territory or by Congress's own initiative. The enabling act is important because it is usually the bill which spells out the conditions that Congress expects the new state to meet

Price of Admission: Causes, Effects, and Patterns of Condition Imposed on States Entering the Union, 46 Am. J. Legal Hist. 119, 125-129 (2004). *See also* Ohio Enabling Act § 1, 4-5, 2 Stat. 173 (1802); Louisiana Enabling Act § 1-4, 2 Stat. 641 (1811); Illinois Enabling Act § 1, 3-4, 3 Stat. 429 (1818); Omnibus Enabling Act, 25 Stat. 676 (1889). Congress, through enabling acts, authorizes the territory to hold a constitutional convention and draft a constitution. Biber, *supra*, at 127. If the territory follows the established process, it may remit that constitution to Congress for its approval. *Id.* at 128. Congress can approve the constitution, reject it, modify it, or condition it. *Id.* It is at that point that Congress decides whether it will accept the territory as a federal state or not. If it does not accept the territory as a state of the Union, it will remain a territory. *See National Bank v. County of Yankton*, 101 U.S. 129, 133 (1879) ("All territory within the jurisdiction of the United States not included in any State must necessarily be governed by or under the authority of Congress.") That stage of acceptance as a federal state has not taken place with Puerto Rico; it was not contemplated as part of the process established by Congress in Public Law 600.

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before (and after) admission; these conditions are often required to be drafted into the new state constitution itself and/or to be part of an "irrevocable" ordinance passed by the state constitutional convention.").

For its part, Sec. 2 of Art. I of the Constitution of the Commonwealth of Puerto Rico, which establishes that "[t]he government of the Commonwealth of Puerto Rico and its Legislative, Executive and Judicial Powers ... will be equally subordinated to the sovereignty of the people of Puerto Rico," does not mean that Puerto Rico has been invested with its own sovereignty or that Congress has lost its own. It only means that Congress delegated to Puerto Ricans the power to manage the government of the Island and its own internal affairs, subject to the will of the people.[17] In that sense, the People of Puerto Rico is a sovereign only for purposes of local matters that are not governed by the Constitution of the United States. *Calero-Toledo v. Pearson Yacht Leasing Co.*, *supra*, at 673. Nevertheless, that does not mean that Puerto Rico ceased to be, as a matter of constitutional law, a territory of the United States; there was never a transfer of sovereignty, only a

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[17] On November 25, 1953, the General Assembly of the United Nations (UN) decided that the United States could stop sending information about Puerto Rico, according to the scheme of international law that prevailed at that time. Subsequently, the UN adopted specific criteria to determine when a member State has the obligation to transmit information about a non-autonomous territory. Res. 1541 (XV) of 1960. This does not affect the effectiveness of the actions taken prior to the approval of said criteria. About this matter, Trías Monge himself has stated that "Congress would not give any weight in the coming years to what the United Nations has done." IV Trías Monge, *op. cit.*, at 57. What is relevant here is that the efforts at the UN did not alter the status of Puerto Rico within the constitutional scheme of the United States.

delegation of powers. That would be made clear in the cases that would follow.

In *Examining Bd. of Engineers, Architects and Surveyors v. Flores de Otero, supra*, the validity of a Puerto Rico law requiring American citizenship in order to obtain an engineering license was questioned. The U.S. Supreme Court invalidated it again without specifying pursuant to which provision of the U.S. Constitution it was acting, whether the equal protection clause of the Fourteenth Amendment or the due process clause of the Fifth Amendment. However, the Court recognized the application and validity of the insular cases and approvingly cited *Downes v. Bidwell, supra*, and *Balzac v. Porto Rico, supra*. It went further and stated that what it did in *Calero-Toledo v. Pearson Yacht Leasing Co., supra*, was reassert the doctrine of the insular cases.[18] In other words,

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[18] The U.S. Supreme Court stated the following: "It is clear now, however, that the protections accorded by either the Due Process Clause of the Fifth Amendment or the Due Process and Equal Protection Clauses of the Fourteenth Amendment apply to residents of Puerto Rico. The Court recognized the applicability of these guarantees as long ago as its decisions in *Downes v. Bidwell*, 182 U.S. 244, 283-284, 21 S. Ct. 770, 785, 45 L. Ed. 1088 (1901), and *Balzac v. Porto Rico*, 258 U.S. 298, 312-313, 42 S.Ct. 343, 348, 66 L.Ed. 627 (1922). The principle was reaffirmed and strengthened in *Reid v. Covert*, 354 U.S. 1, 77 S. Ct. 1222, 1 L.Ed.2d 1148 (1957), and then again in *Calero-Toledo*, 426 U.S. 663, 94 S. Ct. 2080, 40 L.Ed.2d 452 (1974), where we held that inhabitants of Puerto Rico are protected, under either the Fifth Amendment or the Fourteenth Amendment, from the official taking of property without due

by determining whether certain provisions of the U.S. Constitution applied to Puerto Rico, the Supreme Court continued to treat Puerto Rico as a territory.

But it was not until *Torres v. Puerto Rico*, 442 U.S. 465 (1979), that the Supreme Court was straightforward in its use of the doctrine of the insular cases to see if one of the clauses of the Constitution of the United States applied to Puerto Rico. That case had to do with the validity of a search conducted by a state police officer on a person at the Isla Verde airport. The Court concluded that the search had been unreasonable. In order to decide whether the protection of the Fourth Amendment against unreasonable searches and seizures applied to Puerto Rico, the Court studied the entire doctrine of the insular cases and subsequently applied it:

> Congress may make constitutional provisions applicable to territories in which they would not otherwise be controlling... Congress generally has left to this Court the question of what constitutional guarantees apply to Puerto Rico... However, because **the limitation on the application of the Constitution in unincorporated territories is based in part on the need to**

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process of law." *Examining Bd. of Engineers, Architects and Surveyors v. Flores de Otero, supra*, at 600.

> **preserve Congress' ability to govern such possessions**, and may be overruled by Congress, a legislative determination that a constitutional provision practically and beneficially may be implemented in a territory is entitled to great weight. (emphasis added) *Id.* at 470.

The Supreme Court then concluded that the intent of Congress, as evidenced by the Jones-Shafroth Act (now known as the Federal Relations Act) and by Public Law 600, was for the protections of the Fourth Amendment to apply to Puerto Rico. *Id.* at 470 ("Both Congress' implicit determinations in this respect and long experience establish that the Fourth Amendment's restrictions on searches and seizures may be applied to Puerto Rico without danger to national interests or risk of unfairness.").[19]

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[19] "From 1917 until 1952, Congress by statute afforded equivalent personal rights to the residents of Puerto Rico. Act of Mr. 2, 1917, § 2, cl. 13-14, 39 Stat. 952, repealed, Act of July 3, 1950, § 5(1), 64 Stat. 320 (effective July 25, 1952). When Congress authorized the people of Puerto Rico to adopt a constitution, its only express substantive requirements were that the document should provide for a republican form of government and "include a bill of rights." Act of July 3, 1950, § 2, 64 Stat. 319, 48 U.S.C., § 731c. A constitution containing the language of the Fourth Amendment, as well as additional language reflecting this Court's exegesis thereof, P.R. Const., Art. II, § 10, was adopted by the people of Puerto Rico and approved by Congress. See Act of July 3, 1952, 66 Stat. 327. That constitutional provision remains in effect." *Torres v. Puerto Rico, supra*, at 270.

It is unquestionable that in *Torres v. Puerto Rico, supra*, the Court treated Puerto Rico as a territory.[20] *See* Alvarez González, *op. cit.*, at 510.

In another line of cases questioning the validity of certain federal rules related to Puerto Rico, it also arises clearly that Puerto Rico continued to be a territory. Alvarez González, *op. cit.*, at 510. In *Califano v. Torres*, 435 U.S. 1 (1978), a federal aid program that excluded the residents of Puerto Rico was challenged and the Supreme Court upheld its validity.

In *Harris v. Rosario*, 446 U.S. 651-52 (1980), which presented a similar controversy, the Supreme Court clarified the grounds for said unequal treatment of Puerto Rico:

> Congress, which is empowered under the Territory Clause of the Constitution, to "make all needful Rules and Regulations respecting the Territory ... belonging to the United States," may treat Puerto Rico differently from States so long as there

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[20] The difference between an incorporated territory and an unincorporated territory is inconsequential for the analysis that must be done in this case. The caselaw of the U.S. Supreme Court, by concluding that territories derive their authority from the same sovereign as the United States, does not make that distinction.

> is a rational basis for its actions. (Citations omitted.)[21]

What is clear from these cases is that the U.S. Supreme Court continued to treat Puerto Rico as a territory subject to the territorial clause and, therefore, to the powers of Congress. In exercising its power over the territory, Congress provided that the effectiveness of Public Law 600 would be contingent, inasmuch as it would take effect only if the People of Puerto Rico agreed to it, which in effect happened. That is why that authority is exercised today within the parameters of Public Law 600 and the Constitution approved by Congress pursuant to its plenary power over the territory. As Judge Breyer, now an Associate Justice of the U.S. Supreme Court, pointed out in *Córdova & Simonpietri Ins. Agency Inc. v. Chase Manhattan Bank N.A.*, 649 F.2d 36, 41 (1st Cir. 1981), after the creation of the Commonwealth, relations between the United States and Puerto Rico ceased to be subject only to the territorial clause, and new legal restrictions, self-imposed by Congress, were added ("the federal government's relations with Puerto Rico changed from being bounded merely by the

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[21] The Supreme Court concluded that, as in *Califano*, there are three reasons that justify the action by Congress: "Puerto Rican residents do not contribute to the federal treasury; the cost of treating Puerto Rico as a State under the statute would be high; and greater benefits could disrupt the Puerto Rican economy." *Harris v. Rosario, supra*, at 652. For a critique of these cases *see*, J. Trías Monge, *El Estado Libre Asociado ante los tribunales, 1952-1994*, Rev. Jur. UPR 1 (1995).

territorial clause, and the rights of the people of Puerto Rico as United States citizens, to being bounded by the United States and Puerto Rico Constitutions, Public Law 600, the Puerto Rican Federal Relations Act and the rights of the people of Puerto Rico as United States citizens.").

Nevertheless, far from representing an irrevocable renunciation of its power over the territory, those legal limitations approved by Congress are part of the exercise of said legislative power. Thus, in the same way that relations between the District of Columbia ceased to be subject merely to the will of Congress authorized by Art. I, § 8, Cl. 17 of the Constitution upon the approval of legislation giving the District an elective municipal government, relations between Puerto Rico and the federal government are governed not only by Art. I, § 8, of the Constitution, but also by the legislation approved by Congress. *See* District of Columbia Home Rule Act, D.C. Code §§ 1-201.01-1-207.71 (2001); *Washington, D.C. Ass'n of Realtors, Inc. v. District of Columbia*, 44 A.3d 299 (D.C. 2012).

That delegation of power does not constitute an irrevocable renunciation nor a termination of the power of Congress. The People of the United States granted Congress, through the Constitution, ample power to manage the territories. For this reason, Congress cannot irrevocably renounce a power that was conferred on it by the People of the United States. *See Clinton v. City of New York*, 524 U.S. 417, 452 (1998) ("The Constitution is a compact enduring for more than our time, and one Congress

cannot yield up its own powers, much less those of other Congresses to follow."). *See also* R.S. Mariani, *Sovereignty At Issue, Supreme Court's Ambiguity and the Circuits' Conflict on the Application of the Dual Sovereignty Doctrine to Puerto Rico*, 63 Rev. Jur. UPR 807 (1993); E. Rivera Pérez, *Puerto Rico: Tres caminos hacia un futuro*, Publicaciones Puertorriqueñas, San Juan, 1991, at 25-26.[22] That is why the alternate proposal of some authors is not persuasive. *See* D.M. Helfeld, *Understanding United States-Puerto Rico Constitutional and Statutory Relations Through Multidimensional Analysis*, 82 Rev. Jur. UPR 841, 874-875 (2013);[23] Hernández Colón, *op. cit.*

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[22] The case with the Northern Mariana Islands is a clear example of how Congress can grant certain attributes to a territory and later suppress them at will. The Mariana Islands used to manage their own immigration system, even after becoming the Commonwealth of the Northern Mariana Islands. However, in 2008, Congress, by means of the Consolidated Natural Resources Act of 2008, Pub. L. No. 110-229, 122 Stat. 754-876, stripped it of all power to manage its own immigration system. *See* R. J. Misulich, *A Lesser-Known Immigration Crisis: Federal Immigration Law in the Commonwealth of the Northern Mariana Islands*, 20 Pac. Rim L. & Pol'y J. 211 (2011).

[23] *But see* D. M. Helfeld, *Congressional Intent and Attitude Toward Public Law 600 & the Constitution of the Commonwealth of Puerto Rico*, 21 Rev. Jur. UPR 255, 307 (1952) ("Though the formal title has changed, in constitutional theory Puerto Rico remains a territory. This means that Congress continues to possess plenary but unexercised authority over Puerto Rico. Constitutionally, Congress may repeal Public Law 600, annul the Constitution of Puerto Rico

It is true, as well, that some U.S. Supreme Court Justices have stated that the doctrine of the insular cases must be revised. *See Harris v. Rosario, supra*, at 653 (Dissenting opinion of Associate Justice Marshall) ("While some early opinions of this Court suggested that various protections of the Constitution do not apply to Puerto Rico,... the present validity of those decisions is questionable."); *Torres v. Puerto Rico, supra*, at 475 (Concurring opinion of Associate Justice Brennan) ("Whatever the validity of the [Insular Cases] in the particular historical context in which they were decided, those cases are clearly not authority for questioning the application of the Fourth Amendment—or of any other provision of the Bill of Rights—to the Commonwealth of Puerto Rico in the 1970's."). However, it has not been stated that Puerto Rico has ceased to be a territory subject to the plenary powers of Congress.

D. Position of the U.S. Executive Branch

The Executive Branch of the federal government has also confirmed that Puerto Rico continues to be a territory of the United States, which leaves unaltered the sovereign authority exercised by Congress. In 2000, the President of the United States, Bill Clinton, established by decree the Presidential Task Force on the Status of Puerto Rico, with the purpose of studying a future status for

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and veto insular legislation which it deems unwise or improper.").

Puerto Rico.[24] The Presidents who followed, George W Bush and Barack Obama, renewed the task force during their respective administrations. These groups completed several reports on Puerto Rico. Their findings confirm that Puerto Rico continues to be a territory of the United States.

Specifically, the Task Force Reports of December 2007, at 19-20, and of March 2011, at 3, acknowledge that the Constitution approved by Puerto Rico was subject to conditions by Congress. Both the 2007 and the 2011 Reports explain that current relations between Puerto Rico and the United States are still defined by the Constitution of the United States and the Federal Relations Act. Presidential Task Force Report of March 2011, at 20; Presidential Task Force Report of December 2007, at 5. That statement clearly shows that the Commonwealth of Puerto Rico does not have any authority to change its relationship with the United States. The legal status of Puerto Rico is that of a territory subject to the plenary power of Congress. Presidential Task Force Report of December 2007, at 5. Its official name (Commonwealth of Puerto Rico) does not define or change its territorial status.

When discussing Puerto Rico's current political status, the Report of March 2011, at 28, affirms that the Commonwealth of Puerto Rico is governed by the Territorial Clause of the Constitution of the United

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[24] *http://www.whitehouse.gov/sites/default/files/uploads/Puerto_Rico_Report_Espanol.pdf* (last visit, March 20, 2015).

States. Consequently, it is subject to the plenary powers of Congress. It is also asserted in the document that it is impossible to establish a relationship between the territory and the federal government that may only be altered by mutual consent. *Id.* *See also* Presidential Task Force Report of December 2007, at 6. This relationship cannot be put into practice "because a future Congress could decide to modify the relationship unilaterally." *Id.*

That means that Congress can allow for the Commonwealth to remain as a political system indefinitely and, on the other hand, it has the constitutional authority to amend or revoke the powers exercised by the Government of Puerto Rico to manage its internal affairs. Presidential Task Force Report of December 2007, at 6. In other words, Puerto Rico's internal government system is entirely subject to the political will and legal authority of Congress. *Id.* That explains why, by mandate of federal law, federal service of process is still made to the "United States of America, SS the President of the United States." Federal Relations Act, § 10, P.R. Laws Ann., Vol. I, 48 U.S.C. § 874.

All of the above leads us to conclude that the approval of a constitution for Puerto Rico did not represent a change in the basis of its relationship with the United States and, therefore, Puerto Rico continues to be a territory subject to the territorial clause of the Constitution of the United States. The legislative history of Public Law 600 and its subsequent interpretation by the U.S. Supreme Court so reveal. It is also thusly interpreted by the

federal Executive Branch. In short, there is unanimity among the three branches regarding this matter.

VI

The Commonwealth of Puerto Rico has a unique relationship, unparalleled in the history of the United States,[25] as the first territory the inhabitants of which have drafted their own constitution to manage their local affairs. However, based on all of the foregoing, we must conclude that the power that Puerto Rico undoubtedly exercises in prosecuting crime really emanates from the sovereignty of the United States and not from an original sovereignty. *Grafton v. United States, supra*; *Puerto Rico v. Shell Co., supra*. Nevertheless, the Court of Appeals concluded that the doctrine of dual sovereignty applies to Puerto Rico and it determined that Mr. Sánchez del Valle and Mr. Gómez Vázquez could be prosecuted in the Puerto Rico courts, even after they had been indicted in federal court for the same offense. Those conclusions are wrong.

It is true that the U.S. Supreme Court has stated repeatedly that Puerto Rico enjoys a degree of autonomy and independence normally associated with the states of the Union. *See, e.g., Examining Bd. of Engineers, Architects & Surveyors v. Flores de Otero, supra*, at 595 ("the purpose of Congress in the 1950 and 1952 legislation was to accord to Puerto

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[25] *See Examining Bd. of Engineers, Architects & Surveyors v. Flores de Otero, supra*, at 596.

Rico the degree of autonomy and independence normally associated with States of the Union."). We have also stated the same. *See E.L.A. v. Northwestern Selecta*, 185 P.R. Dec. 40 (2012).

Other cases in which the Supreme Court treated the Commonwealth of Puerto Rico as if it were a state of the Union are: *El Vocero de Puerto Rico (Caribbean Intern. News Corp.) v. Puerto Rico*, 508 U.S. 147 (1993) (First Amendment); *P.R. Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993) (Eleventh Amendment immunity); *P.R. Dept. of Consumer Affairs v. Isla Petroleum*, 485 U.S. 495 (1988) (preemption); *Puerto Rico v. Branstad*, 483 U.S. 219 (1987) (extradition); *Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986) (commercial expression pursuant to the First Amendment); *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592 (1982) (*parens patriae* power over migrant workers); *Rodríguez v. Popular Democratic Party*, 457 U.S. 1 (1982) (equal protection of the law); *Chardón v. Fernández*, 454 U.S. 6 (1981) (statute of limitations); *Torres v. Puerto Rico, supra*, (Fourth Amendment); *Calero-Toledo v. Pearson Yacht Leasing Co., supra*, (allowing the appeal of a controversy involving the validity of a Puerto Rico law as if it were the law of a state).

In fact, prior to the creation of the Commonwealth, the U.S. Supreme Court had already held that "[t]he objective of the Foraker Act and of the Organic [Jones] Act was to give Puerto Rico the full power of local self-determination, with an autonomy similar to that of the states and

incorporated territories." *Puerto Rico v. Shell Co., supra*, at 261-262 *[translation ours]. See also* in the same sense, in effect Jones-Shafroth Act, *Bacardi Corp. of America v. Domenech*, 311 U.S. 150 (1940). The same was said while the Foraker Act was in force: *Porto Rico v. Rosaly y Castillo*, 227 U.S. 270 (1913); *Gromer v. Standard Dredging Co.*, 224 U.S. 362 (1912). That shows that, by 1952, that language was not new.

The allegation of the Solicitor General is also correct, in the sense that Puerto Rico has the capacity to adopt and enact its own civil and criminal laws. *See Calero-Toledo v. Pearson Yacht Leasing Co., supra*, at 671, citing A. Leibowitz, *The applicability of Federal Law to the Commonwealth of Puerto Rico*, 56 Geo. L. J. 219, 221 (1967) ("Pursuant to that constitution, the Commonwealth now 'elects its Governor and legislature; appoints its judges, all cabinet officials, and lesser officials in the executive branch; sets its own educational policies; determines its own budget; and amends its own civil and criminal code' ").

However, the analysis that must be performed to determine whether there are two different sovereigns under the constitutional double jeopardy clause is not whether the entity is similar to, acts like or has certain attributes of a true sovereign. The fundamental question, according to the U.S. Supreme Court, is whether the two entities derive their authority from the same ultimate source of power. *United States v. Wheeler, supra; Waller v. Florida, supra.* In other words, the question is not

whether the entity can exercise a given power, but rather under whose authorization does it ultimately exercise that power.

After an objective analysis of the history and immense juridical literature on the subject, we must conclude that, with the adoption of a constitution, Puerto Rico did not cease to be a territory of the United States subject to the powers of Congress, as provided in the territorial clause of the federal Constitution (Art. IV, § 3).

Puerto Rico's authority to prosecute individuals is derived from its delegation by United States Congress and not by virtue of its own sovereignty. As we have seen, and contrary to the Native-American tribes or the states of the Union, **Puerto Rico never had original or prior sovereignty under which it delegated powers to Congress.** **It is the other way around.** Spain's sovereignty over Puerto Rico was formally transferred to the United States in 1899 with the Treaty of Paris. Since then, the United States has managed Puerto Rico through legislation passed pursuant to the territorial clause of the federal Constitution. The adoption of a constitution, by delegation of Congress, to organize a local government, replacing a large part of the organic act in effect at that time, did not represent a transfer of sovereignty to Puerto Rico. To the contrary, Puerto Rico did not cease to be a territory of the United States. Therefore, the rule established in *Grafton v. United States, supra*, and reaffirmed in *Puerto Rico v. Shell Co., supra*, applies to it.

In conclusion, the Commonwealth of Puerto Rico is not a sovereign entity inasmuch as, being a territory, its ultimate source of power to prosecute offenses is derived from the United States Congress. *See United States v. Lara, supra*, at 226 (Dissenting opinion of Associate Justice Thomas) (citations omitted) ("[T]he Court has held that the Territories are the United States for double jeopardy purposes... It is for this reason as well that the degree of autonomy of Puerto Rico is beside the point"). It exercises its power as part of a **delegation** of powers and not based on a **transfer** of sovereignty by the United States Congress.

Therefore, the grounds used in *Pueblo v. Castro García, supra*, and the result reached therein, are not based on federal constitutional law. We have acknowledged the importance of precedents in the development of our caselaw (*stare decisis*). However, that general principle cannot lead us to wrongfully perpetuate doctrinal mistakes. Our decisions do not have "the scope of a dogma that must be blindly followed even when the court is subsequently convinced [that] its prior decision is wrong." *Am. Railroad Co. v. Comisión Industrial*, 61 P.R. Dec. 314, 326 (1943). For that reason, we have identified three circumstances that, as exceptions, justify setting a precedent aside: "(1) if the previous decision was clearly wrong; (2) if it has adverse effects on the rest of the laws, and (3) if the number of persons who relied upon the decision is limited." *Pueblo v. Camacho Delgado*, 175 P.R. Dec. 1, 20 n. 4 (2008). *See also Fraguada Bonilla v. Hosp. Aux. Mutuo*, 186 P.R. Dec. 365, 391 (2012); *E.L.A. v. Crespo Torres*,

180 P.R. Dec. 776, 796-797 (2011); *Pueblo v. Díaz de León*, 176 P.R. Dec. 913, 920 (2009); *San Miguel, etc. & Cía v. Guevara*, 64 P.R. Dec. 966, 974 (1945).

The first of these principles solves the matter at hand. Applying it, we overrule *Pueblo v. Castro García, supra*, and conclude that a person who was prosecuted in federal court cannot be prosecuted for the same offense in the Puerto Rico courts because that would constitute a violation of the constitutional protection against double jeopardy, as provided in the Fifth Amendment to the Constitution of the United States. The arguments raised by the Government necessarily entail rejecting the application of a clear and precise constitutional right, such as the prohibition of double jeopardy in penal cases.

Prohibiting the prosecution of a defendant in both jurisdictions is limited to charges for the same offense. That limitation does not arise as a consequence of our decision, but rather from the territorial status of Puerto Rico. That being said, this does not mean that the government of Puerto Rico and the federal government cannot work together and reach collaborative agreements to fight crime.

We agree that if Puerto Rico were a state of the Union, the dual sovereignty rule would apply and the local government would be able to move forward with the criminal case against petitioners. However, declaring statehood is not one of our constitutional powers. As a territory, Puerto Rico does not have an original

sovereignty separate from that of the federal government. Therefore, the doctrine of dual sovereignty does not provide an exemption from the application, in cases such as this one, of the constitutional guarantee against double jeopardy. It was thus held in *Puerto Rico v. Shell Co., supra*, and *Grafton v. United States, supra*. The delegation of congressional power with the creation of the government of the Commonwealth of Puerto Rico did not alter that objective legal reality.

That is the current state of law. We cannot reverse a decision of the United States Supreme Court or refuse to abide by it, especially if just for mere convenience. "'Convenience and efficiency,' [...] 'are not the primary objectives' of our constitutional framework." *N.L.R.B. v. Noel Canning*, 573 U.S. __, __, 134 S. Ct. 2550, 2598 (2014) (Concurring opinion of Associate Justice Scalia). Furthermore, as stated by Associate Judge Rebollo López:

> Even when in our personal character we have the absolute constitutional right to create and think according to our particular view of life and the world in which we live, as members of this Court we cannot afford to decide the matters before our consideration based on those personal beliefs or desires, with complete abstraction from the legal reality that surrounds us. *Pueblo v. Castro García, supra*, at 790 (Dissenting opinion of Associate Judge Mr. Rebollo López).

The precedents of the U.S. Supreme Court are binding on us and the Government has not presented a convincing argument that renders them inapplicable. It is our precedent that is clearly erroneous and fails to recognize petitioners' constitutional right. That is why it cannot prevail. Thus, Mr. Sánchez del Valle and Mr. Gómez Vázquez cannot be prosecuted in the Puerto Rico courts for the same offense (or for a lesser included offense) for which they have already been sentenced by the U.S. District Court for the District of Puerto Rico.

VII

Based on all of the foregoing, we hereby reverse the decision of the Court of Appeals and order the dismissal of the claims filed pursuant to Article 5.01 of the Puerto Rico Weapons Act, *supra*, against Mr. Sánchez del Valle and Mr. Gómez Vázquez.

Judgment will be entered accordingly.

[signed: *Rafael L. Martínez Torres*]
RAFAEL L. MARTÍNEZ TORRES
Associate Judge

[CERTIFIED TRANSLATION]

CERTIFICATE OF TRANSLATION INTO ENGLISH

I, Margot A. Acevedo, of legal age, married, a resident of Shorewood, WI., a professional interpreter/ translator, certified by the Administrative Office of the United States Courts, do HEREBY CERTIFY that I have personally translated the foregoing document and that it is a true and accurate translation to the best of my knowledge and abilities.

In San Juan, Puerto Rico, today, June 29, 2015.

Margot A. Acevedo
ATABEX TRANSLATION SPECIALISTS, Inc.
P.O. Box 195044. San Juan. PR 00919-5044

[CERTIFIED TRANSLATION]

IN THE SUPREME COURT OF PUERTO RICO

The People of Puerto Rico
Respondent
v.
Luis M. Sánchez Valle
Petitioner

The People of Puerto Rico
Respondent
v.
Jaime Gómez Vázquez
Petitioner

CC-2013-68
cons. with
CC-2013-72

Certiorari

Concurring Opinion issued by Chief Justice FIOL MATTA and joined by Associate Justice ORONOZ RODRÍGUEZ

In San Juan, Puerto Rico, on March 20, 2015.

I concur with the majority opinion of this Court in the sense that a person should not be prosecuted in our courts for the same offense for which he has already been prosecuted in federal court. I base my opinion not on the protection against double jeopardy of the Fifth Amendment of the United States Constitution, but on the fundamental protection

against double jeopardy recognized in the Constitution of the Commonwealth of Puerto Rico. What I find unsustainable is the reasoning on which the Opinion is based—a completely out-of-context interpretation, not only of our own constitutional history, but also of the fundamentals of the dual sovereignty doctrine in federal jurisprudence.

The majority reasons that Puerto Rico lacks authority to prosecute the two petitioners because "it does not have original sovereignty separate from that of the federal government" and because "the creation of the government of the Commonwealth did not change this objective legal reality." [1] According to their analysis, in order to avoid this, we would have had to be like the Indian tribes of Norte America or a federal state. The opinion is wrong in its analysis of our constitutional history and current relationship with the United States. Our history demonstrates that Puerto Rico has sufficient sovereignty to prosecute the petitioners again under our local criminal laws.

Our history also reveals that when the People of Puerto Rico claimed and assumed the power to create and punish crimes by adopting the Constitution of the Commonwealth of Puerto Rico, they decided to exercise this power responsibly, within the boundaries of the principle on which our entire legal code, and particularly our fundamental

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[1] Majority Opinion, at 67.

rights, are based—respect for human dignity.[2] In its haste to undermine the spirit of our Constitution and our efforts to affirm ourselves as a nation, the majority has ignored the actual controversy involved in this case: the fundamental inconsistency between the possibility of prosecuting an individual twice for the same criminal acts and the crucial guiding principle of Puerto Rico's Constitution, the inviolability of human dignity.

Consequently, today I concur with the outcome of the majority opinion, not because Puerto Rico lacks sovereignty to prosecute the petitioners, but because under the circumstances of this case, doing so would violate the protection against double jeopardy that our Constitution[3] guarantees them.

I

The majority opinion adequately describes the procedural history of the appeals in this case. We point out, however, that in both cases the Court of First Instance dismissed *all* of the criminal complaints against the petitioners on the grounds that, despite the holding of this Court in *Pueblo v. Castro García*, Puerto Rico does not possess sovereignty of its own, separate from the federal government, because they both derive their power to

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[2] P.R. Const., Art. II, Section 1.

[3] P.R. Const., Art. II, Section 11.

prosecute citizens from the same source: the United States Congress.[4]

Therefore, the lower court concluded that submitting the petitioners to a criminal trial for the same acts already adjudicated in the United States District Court would violate the constitutional protection against double jeopardy.

The prosecution sought review of both dismissals in the Court of Appeals. The Court of Appeals consolidated the two appeals and reversed the dismissal of the criminal complaints on the grounds that under the current status of the law in Puerto Rico, pursuant to *Pueblo v. Castro García*, the Commonwealth of Puerto Rico and the federal government constitute separate and distinct sovereigns and have independent authority to proscribe and punish the criminal conduct of their citizens.[5]

Unsatisfied, both Mr. Sánchez Valle and Mr. Gómez Vázquez filed petitions for writs of certiorari with this Court. We issued both writs and consolidated them as they dealt with the same controversy.

II

Protection from double jeopardy is a basic principle of our legal code, because the Bill of Rights

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[4] *Pueblo v. Castro García*, 120 P.R. Dec. 740 (1988).

[5] *Id.*

in the Commonwealth of Puerto Rico's Constitution prohibits punishing a citizen twice for the same offense.[6] This provision stems from the similar protection set forth in the Fifth Amendment of the United States Constitution, which establishes the minimum content that our constitutional protection must provide.[7]

The constitutional protection against double jeopardy embodies deeply-rooted principles in the history of western civilization.[8] Roman Law, as well as Greek Law and Canon Law, protects individuals from multiple proceedings and punishments for one same offense or infraction.[9] Although the precise origins of the common law protection against double jeopardy are unknown, by the mid-Thirteenth Century a certain type of protection against double

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[6] PR Const. Art. II, Section 11. *Pueblo v. Rivera Cintrón*, 185 P.R. Dec. 484, 493 (2012); *Pueblo v. Santiago*, 160 P.R. Dec. 618, 626 (2003).

[7] For a comparison between the clause in the U.S. Constitution and the protection of our Constitution, *see* Ernesto L. Chiesa, II *Derecho Procesal Penal de Puerto Rico y Estados Unidos* [*Criminal Procedural Law of Puerto Rico and the United States*], Section 16.1, at 349 (1995).

[8] David S. Rudstein, *Double Jeopardy: A Reference Guide to the United States Constitution* 1 (2004).

[9] Rudstein, *op. cit.*, at 2-3. *See also* Erin M. Cranman, *The Dual Sovereignty Exception to Double Jeopardy: A Champion of Justice or a Violation of a Fundamental Right*, 14 Emory Int'l L. Rev. 1641, 1644 (2000).

jeopardy was already recognized.[10] English jurisprudence developed this concept in two defenses, *autrefois acquit* (prior acquittal) and *autrefois convict* (prior conviction). By the Eighteenth Century, Blackstone opined that the principle that no one shall be placed in jeopardy more than once for the same offense constituted a "universal maxim of common law."[11]

In the United States, the principles that eventually influenced the drafting of the Fifth Amendment were present in the colonies since the Sixteenth Century, when several of them statutorily recognized the protection against double jeopardy.[12] In 1784, New Hampshire was the first state to include the protection against double jeopardy in its constitution, even before the United States Constitution was adopted in 1789 and the Fifth Amendment of the U.S. Constitution was ratified in 1791.[13]

That is the historical background of the protection provided by Section 11 of our Bill of Rights. The protection granted by our Constitution is something we inherited from common law or

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[10] Rudstein, *op. cit.*, at 1, 4.

[11] *Id.* at 4, citing 4 *Blackstone Commentaries* 335. (Our translation).

[12] *Id.* at 11-12.

[13] *Id.* at 15.

Anglo-American law and later incorporated into Puerto Rican law as a result of our relationship with the United States. Therefore, it is particularly important as a source to interpret its scope.[14]

A

The constitutional protection against double jeopardy is based on several considerations of public policy. It is intended to prevent the government from having a second opportunity to prosecute an individual with the benefit of the strategic and substantive knowledge that it may have acquired about the defendant's defense during the first proceedings. It also prevents the individual from being submitted to multiple prosecutions, protecting him from being harassed by the state and living with the anxiety of not knowing whether he will be found guilty at some point even if he is innocent or was acquitted from responsibility. Allowing the State to use all of its resources and powers against a person who is allegedly the perpetrator of a crime,

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[14] *Pueblo v. Santiago, supra*, at 627, n. 8. We are referring to common law in the sense of Anglo-American law, acknowledging that the term has a different meaning in Spanish Civil Law. In countries that have a civil law system, and in international criminal law, the principles of the protection against double jeopardy are found in the rule called *non bis in idem* (not twice for the same). This maxim is in turn derived from Roman Law which established that "*nemo debet bis vexari pro una et eadam causa*" (a man should not be punished or prosecuted twice for the same cause). See Gerard Conway, *Ne bis in idem in International Law*, 3 Int. Crim. L. Rev. 217, 221-22 (2003).

repeatedly, and without restriction whatsoever, would constitute an abuse of power. [15] In short, this provision protects individuals because it limits the exercise of the State's vast punitive power.

The constitutional guarantee against double jeopardy provides four types of protection: protection from a second prosecution after acquittal for the same offense; protection from a second prosecution after conviction for the same offense; protection from a second prosecution after trial for the same offense has commenced; and protection from multiple punishments for the same offense. That is, it protects individuals from multiple punishments and proceedings for the same criminal conduct.[16]

The main requirement for triggering the protection against double jeopardy is for both proceedings to be an attempt to prosecute or punish a citizen for the same offense. If the State attempts to punish a citizen for different crimes, then the constitutional protection against double jeopardy does not apply, although the citizen could be protected by statutory protections that embody the

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[15] *Pueblo v. Rivera Cintrón*, *supra*, at 493; *Pueblo v. Santiago*, *supra*; *Pueblo v. Martínez Torres*, *supra*, at 568. See, Ernesto L. Chiesa, *Doble exposición* [*Double Jeopardy*], 59 L. Rev. UPR 479, 482 (1990).

[16] *Pueblo v. Santiago*, *supra*, at 628; *Pueblo v. Martínez Torres*, *supra*, at 568-69; *Ohio v. Johnson*, 467 U.S. 493, 498 (1984); *Brown v. Ohio*, 432 U.S. 161, 165 (1977).

same principles of public policy, such as the concept of concurrent offenses.[17]

When evaluating whether a person has been tried twice for the same offense, courts must apply the standard formulated in *Blockburger v. US*: two offenses are not the same if each offense requires proof of a fact that the other does not require.[18] Thus, the court must compare the definition of the offenses in dispute to determine whether or not the elements that need to be proved are the same. If they are, then both constitute the same offense and the constitutional protection against double jeopardy is activated. Likewise, this protection is activated if one of the offenses is a lesser offense included in the

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[17] Although the Weapons Act expressly provides that the concept of concurrent offenses shall not apply to the offenses defined therein, under other circumstances, the concept of concurrent offenses and the dual sovereignty doctrine may apply. 25 P.R. Laws Ann. § 460b. See Ernesto L. Chiesa, *Doble Exposición* [*Double Jeopardy*], *supra*, at 544.

[18] *Blockburger v. U.S.*, 284 U.S. 299 (1932). Chiesa, *Doble exposición* [*Double Jeopardy*], *supra*, at 485 (1990). The *Blockburger* standard was overruled in *Grady v. Corbin*, 495 U.S. 508 (1990), where the U.S. Supreme Court interpreted liberally the term *same offense* of the Fifth Amendment to activate the protection against double jeopardy when two offenses share at least one element of type. Subsequently, the U.S. Supreme Court overruled *Grady* and reinstated the *Blockburger* standard. Therefore, it is the current rule. *U.S. v. Dixon*, 509 U.S. 688 (1993).

other.[19] We have applied the *Blockburger* test on several occasion to determine the scope of the protection against double jeopardy under our Constitution, because the text of our Constitution limits the protection to the same *offense*.[20]

Rule 64(e) of the Rules of Criminal Procedure provides procedural effectiveness to the protection against double jeopardy.[21] In order to invoke such constitutional protection and seek dismissal of a second accusation or indictment, the defendant must demonstrate that a first trial was initiated or held for the same offense that he is being charged with in the second proceedings or for an offense subsumed thereunder. The first trial must have been held before a competent court and through a valid criminal complaint, and the proceedings or sanction must have been of a criminal nature.[22]

B

Both Article 5.01 of the Weapons Act and federal law establish that it is an offense to manufacture,

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[19] *See Pueblo v. Rivera Cintrón*, *supra*, at 495, for a list of new opinions in this regard.

[20] *See* Ernesto L. Chiesa, *Doble exposición* [*Double Jeopardy*], *supra*, for an analysis of the implications of the differences in the way the law was drafted in each constitution.

[21] 34 P.R. Laws Ann. App. II, R. 64(e).

[22] *Pueblo v. Santiago*, *supra*, at 626; *Pueblo v. Martínez Torres*, *supra*, at 568. *See also* Chiesa *op. cit.*, § 16A.

import or sell a firearm without a permit to do so.[23] They both require the State to prove the same criminal elements, although in federal court it must also de demonstrated that the sale occurred through interstate or international commerce. As the Majority Opinion very well points out, one of the offenses for which both petitioners were prosecuted in the trial court is a misdemeanor included in the federal offenses and constitutes the same offense under the *Blockburger* standard.[24] Consequently, we concur with the Majority Opinion in that only the charges for violations of Art. 5.01 are in conflict with the constitutional protection against double jeopardy, because they expose the petitioners to a second criminal prosecution and to the possibility of receiving a second punishment for the same criminal conduct punished in the U.S. District Court.[25]

However, since the criminal proceedings were initiated in the courts of two different jurisdictions—that of the United States Federal Government and that of the Government of the Commonwealth of Puerto Rico—we must examine the petitioners' situation in light of the dual sovereignty doctrine.

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[23] 25 P.R. Laws Ann. § 458; 18 U.S.C.A. § 922(a)(1)(a).

[24] Maj. Op. at 9.

[25] Although the Court of First Instance dismissed all the charges against the petitioners, the other offenses do not conflict with the protection against double jeopardy, as they constitute different offenses pursuant to the *Blockburger* test.

III

Despite the primacy of the principles embodied in the protections of the Fifth Amendment within the constitutional structure of the United States, the U.S. Supreme Court has developed an exception to the protection against double jeopardy: the dual sovereignty doctrine. According to this exception, the constitutional protection against double jeopardy set forth in the Fifth Amendment does not apply when two different sovereigns initiate criminal proceedings against a citizen for the same offense.

As the United States Supreme Court has explained, since crime is an offense against the authority and dignity of a sovereign, when defining certain conduct as an offense, the government exercises its own sovereignty. When a single act violates the laws of two sovereigns, it offends the peace and dignity of each sovereign and, consequently, two different crimes are committed, even when they share the same elements and involve the same acts. Therefore, since each sovereign prosecutes the individual for a different offense, the Fifth Amendment does not bar the other sovereign from initiating a second criminal prosecution.[26]

Although the Supreme Court applied this doctrine for the first time in 1922, in *U.S. v. Lanza*,

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[26] *Heath v. Alabama*, 474 U.S. 82, 88-89 (1985); *Wheeler v. U.S.*, 435 U.S. 313, 320; *Lanza v. U.S.*, 260 U.S. 377, 382 (1922).

its foundations were articulated in several decisions issued in the Nineteenth Century.[27]

In *Lanza*, the U.S. District Court dismissed five charges against several citizens for violations of the National Prohibition Act, because a court of the State of Washington had convicted these citizens for the same acts and for identical offenses under state

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[27] *U.S. v. Lanza, supra.* In 1833, the U.S. Supreme Court held that the Bill of Rights of the United States Constitution was not binding on States. *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243. This means that the Fifth Amendment did not bar states from prosecuting citizens time and time again, though there could very well be analogous protections in the state's legislation or constitution. However, the Fifth Amendment did bar the federal government from prosecuting an individual multiple times for the same offense. Akhil Reed Amar and Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 Col. L. Rev. 1, 4 (1995). Based on the reasoning in *Barron*, the Court later held that successive punishments by the state and federal governments would not be prohibited, since the prohibition of the Fifth Amendment was only binding on the federal government. *Fox v. Ohio*, 46 U.S. (5 How.) 410 (1847). Later, in *Moore v. Illinois*, the petitioner argued that the possibility of prosecution in federal court invalidated his conviction in state court. The Court rejected the argument and focused on the concept of *offense* or *crime* from the government's standpoint and reasoned that since the defendant was at the same time a citizen of two sovereigns, Illinois and the United States, he owed allegiance to both. Since his conduct violated the laws of both sovereigns, each could punish him, hypothetically for different offenses. 55 U.S. (14 How.) 13, 20 (1852). See Reed Amar, *supra*, at 7.

law.[28] Nevertheless, the United States Supreme Court held that when the State of Washington defined the sale of alcohol and the other offenses in question as crimes, it exercised its own sovereignty and, therefore, a power independent from the federal Government's authority to punish crimes.[29]

The dual sovereignty doctrine is based on the concept that a crime is an offense against the sovereignty of the government and relies on the premise that citizens of the United States are at the same time citizens of a State or territory and, therefore, owe allegiance to two sovereigns, each having authority to punish him, independently of how the other sovereign proceeds.[30] Therefore, for purposes of the prohibition against double jeopardy and the dual sovereignty exception, a sovereign is the political body that has authority to define which conduct will constitute a crime.

However, according to the dual sovereignty doctrine, mere authority to create and punish crime is not sufficient. Both jurisdictions must derive such

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[28] The National Prohibition Act, 41 Stat. 305, codified the prohibition against manufacturing, selling or possessing alcohol that the 18th Amendment of the U.S. Constitution, now repealed, imposed throughout the entire United States. *U.S. v. Lanza*, *supra*, at 379.

[29] *U.S. v. Lanza*, *supra*, at 382.

[30] *Heath v. Alabama*, *supra*, at 88; *Bartkus v. People of State of Ill.*, *supra*, at 131-32, citing *Moore v. People of State of Illinois*, 55 U.S. (14 How.) 13, 19-20 (1855).

authority from different sources.[31] **For purposes of the dual sovereignty doctrine, government entities shall be deemed to be separate sovereigns if they derive their authority to punish crime from different sources of power.**[32] When the U.S. Supreme Court has upheld the dual sovereignty exception, it has examined whether an independent sovereign authority to prosecute exists, instead of analyzing the nature of the political relations between both entities.

The analysis of the ultimate source of power to define and punish crimes rests on a legal fiction that allows the proper functioning of American federalism: within a single territory, which is a sovereign vis-à-vis other nations at the international level, there are two main political entities—member states of the Union and the federal Government—that exercise particular powers and authority, distributed by the U.S. Constitution. This distribution of powers is more complicated than the mere federal Government-State division, because the territory of the United States contains multiple political entities and jurisdictions whose powers occasionally overlap each other, such as the District of Columbia, Indian tribes, territories, military bases and the Commonwealth of Puerto Rico, among

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[31] *Heath v. Alabama*, *supra*, at 88; *U.S. v. Lanza*, *supra*, at 382.

[32] *U.S. v. Wheeler*, *supra*, at 320.

others.[33] The juridical development and history of American federalism obscure the distinction between

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[33] The Majority Opinion at 25-27, mentions decisions of two different Federal Circuit Courts of Appeals that have determined that the U.S. Virgin Islands and Guam are not sovereigns for purposes of the dual sovereignty doctrine. It further states, though federal courts have yet to decide this, that this is probably the case of the Northern Mariana Islands. The superficiality with which the Court's Majority addresses this topic leads it to a grave error. First, the United States has several unincorporated territories subjected to its sovereignty with different degrees of self-government. The case of the U.S. Virgin Islands, Guam and American Samoa are clearly distinguishable from Puerto Rico's case. These three territories are currently governed by organic laws legislated by Congress, which, in each one of these organic laws, has reserved to itself the power to legislate locally and veto or annul laws passed by the territories. Thus, the Legislative Assembly of the Virgin Islands may amend or repeal any local law and pass any new legislation, as long as it is not inconsistent with United States laws applicable to the territory, "subject to the power of Congress to annul any such Act of the Legislature." 48 U.S.C. § 1574(c) (Our translation). In the case of Guam, the Governor must send to the United States Department of the Interior any legislation enacted by the territory. The Department, in turn, sends it to Congress, which "reserves the power and authority to annul the same." 48 U.S.C. § 1423i (Our translation). Lastly, amendments or modifications to the constitution of American Samoa can be made by Congress only. 48 U.S.C. § 1662(a). The foregoing is in keeping with the language cited in the Majority Opinion of 42 U.S.C. § 1704 which establishes that any criminal prosecution in the Virgin Islands, Guam and American Samoa shall bar any other criminal proceedings from being carried out for the same acts in federal court, and *vice versa*. Clearly, these three territories are governed by territorial laws where Congress is the ultimate and

the sovereignty of the federal Government and the sovereignty of the other political entities in its territory and under its control. Furthermore, the federal structure demonstrates that within the U.S. political and legal system there is not a one single or universal conception of *sovereignty* but that, to the contrary, multiple conceptions of *sovereignty* coexist.

When the U.S. Supreme Court began to develop the bases of what would later become the dual sovereignty doctrine, it was not clear which political entities in the United States had the attributes of a sovereign and which did not. In *Moore v. Illinois*, the Supreme Court not distinguish between states and territories of the United States, expressing that a citizen owes allegiance both to these and the federal government:

> Every citizen of the United States is also a citizen of every **State or territory**. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction

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unappealable legislator. On the other hand, other territories with different political arrangements with the United States that do not entail the same legislative restrictions may be considered distinct sovereigns for purposes of the dual sovereignty doctrine. *See* José Trías Monge, *Puerto Rico: Las penas de la colonia más antigua del mundo* [*Puerto Rico: The Hardships of the Oldest Colony in the World*], UPR Publishing House, 1st Edition, at 191-205 (1999) (hereinafter, Trías Monge, *Las Penas* [*The Hardships*]. *See also* Jon M. Van Dyke, *The Evolving Legal Relationships Between the United States & its Affiliated U.S.-Flag Islands*, 14 U. Haw. L. Rev. 444 (1992).

> on the laws of either. The same act may be an offense or transgression of the laws of both.[34] (Emphasis added).

Although in 1907 it was held in *Grafton* that territories are not sovereigns separate from the federal government, in 1959, both in *Bartkus* and in *Abatte*, the U.S. Supreme Court cited with approval the statements made in *Moore v. Illinois, supra*, which imply that a single act may be an offense of the laws of the sovereigns that a citizen owes allegiance to: the federal Government and the states or territories. Nor was any attempt whatsoever made to give some sort of content to the expression "sovereignty" that would allow one to determine when and how such status is reached or enjoyed.

Moreover, under the concept of sovereignty in English common law it would not be understood that states of the Union and the federal Government constitute separate sovereigns. According to common law, "sovereignty" refers to the final, indivisible and unlimited power that must exist in every political society.[35] A simple reading of the

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[34] *Moore v. Illinois, supra*, at 19-20; *Bartkus, supra*, at 131; *Abbate, supra*, at 192.

[35] "The conventional British position understood 'sovereignty' as that indivisible, final and unlimited power that necessarily had to exist somewhere in every political society. A single nation could not operate with two sovereigns any more than a single person could operate with two heads; some single supreme political will had to prevail, and the only limitations on that sovereign will were those that the sovereign itself

United States Constitution reveals that the ultimate source of the United States' power, in all its manifestations, is the American People.[36] They are the ones who possess the ultimate sovereign will from which both the powers of the federal Government and of the states are derived.

In contrast to the Articles of the Confederation, the United States Constitution is not like a treaty between independent sovereign states. Rather, it is an agreement of wills through which the People of the United States created a new federal union after the initial failure of the Confederation. The Articles of Confederation were agreed to by the States and did not confer on the federal Government jurisdiction over the inhabitants of the United States. Given the weakness of the political arrangement of the Confederation and the problems of legitimacy and governance that ensued, the United States Constitution was inspired by popular sovereignty—the will of the people—to legitimize the powers that

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voluntarily chose to observe." Daniel A. Braun, *Praying to False Sovereign: The rule Permitting Successive Prosecutions in the Age of Cooperative Federalism*, 20 Am. J. of Crim. L. 1, 26 (1992) citing Akhil R. Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1245, 1430 (1987)

[36] "We, *the People of the United States*, in Order to form a more perfect Union, establish Justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of Liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America." I P.R. Laws Ann. (emphasis added).

the federal Government possesses and to confer on it jurisdiction over the citizens of the states.[37]

In 1816, Associate Justice Story clearly identified the source of political power in the United States, when he stated the following in *Martin v. Hunter's Lessee:*

> The Constitution of the United States was ordained and established, not by the states in their sovereign capacities, but emphatically, as the preamble of the Constitution declares, by "the People of the United States." There can be no doubt that it was competent to the people to invest the general government with all the powers which they might deem proper and necessary; to extend or restrain those powers according to their own good pleasure, and to give them a paramount and supreme authority. As little doubt can there be, that the people had a right... to make the powers of the state governments, in given cases, subordinate to those of the nation or to reserve to themselves those sovereign

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[37] José J. Álvarez González, *Derecho constitucional de Puerto Rico y relaciones constitucionales con Estados Unidos* [*Constitutional Law of Puerto Rico and Constitutional Relations with the United States*], TEMIS Publishing House, at 4-5 (2009).

> authorities which they might not choose to delegate to either...[38]

Consequently, if we apply the standard articulated by the U.S. Supreme Court, the ultimate source of the authority to create and punish crime really falls upon the People of the United States and not on the federal Government or the states of the Union.

Applying the dual sovereignty doctrine, the U.S. Supreme Court has held that the doctrine allows a State to punish an individual even after another State has already punished him for the same offense.[39] It also allows this when the entity that originally punishes the person for the same offense is the federal Government,[40] just as it allows the federal Government to punish an individual when the State has already punished him for the same offense.[41] Finally, it allows the federal Government to punish a person for the same offense for which an Indian tribe has already punished him.[42] The only instances when the Supreme Court has held that the dual sovereignty doctrine does not apply is when the

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[38] *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat) 304, 324-25 (1816).

[39] *Heath v. Alabama, supra.*

[40] *Bartkus v. People of State of Ill., supra.*

[41] *Abbate v. U.S., supra.*

[42] *U.S. v. Lara*, 541 U.S. 193 (2004); *U.S. v. Wheeler, supra.*

criminal proceedings occur under the authority of the federal Government and a territory of the United States,[43] or under the authority of a municipality and the state that it belongs to.[44]

Let us evaluate the treatment that the U.S. Supreme Court has given to each of the sovereigns that coexist in the U.S. jurisdiction.

A

The States of the Union: *E Pluribus Unum*

As shown above, the U.S. Supreme Court has had no trouble holding that the states of the Union are separate sovereigns for purposes of the dual sovereignty doctrine. This is framed within the principles of U.S. federalism: since the federal Government is a government with enumerated powers, the states retain, under the Tenth Amendment, the powers that were not expressly delegated to the federal Government. Among the powers retained, is the authority to establish and punish crimes.[45]

In *Bartkus v. People of Ill.*, the State of Illinois's criminal prosecution of the defendants after they had been acquitted in Federal Court for the same offense

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[43] *Grafton v. U.S.*, 206 U.S. 333 (1907).

[44] *Waller v. Florida*, 397 U.S. 387 (1970).

[45] *Heath v. Alabama*, *supra*, at 89, citing *U.S. v. Lanza*, *supra*, at 382.

was upheld.[46] In *Abbate v. US*, the Court addressed the opposite situation because the defendants pled guilty in the Court of Illinois before they were prosecuted in Federal Court. Both decisions, issued the same day, validated the dual sovereignty doctrine and reiterated what was stated in *Lanza*.[47]

The holdings in *Bartkus* and *Abbate* are based on the following premise: that within the structure of the United States federal system, the States and the federal Government are independent political communities.[48] That is why the degree of control that may be exercised by the federal Government over state Government does not prevent a state from, in turn, exercising its own sovereignty to punish.[49]

Once the doctrine was formulated, the U.S. Supreme Court continued to extend its application in several cases. In *Heath v. Alabama*, the State of Alabama charged Larry Gene Heath with ordering the kidnapping and subsequent murder of his wife. Heath had already been prosecuted in the State of Georgia where the murder took place, and he had pled guilty in exchange for a life sentence.

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[46] *Bartkus v. People of Ill.*, *supra*, at 129. After rejecting the application of the Fifth Amendment to the State of Illinois, the Supreme Court analyzed the controversy in light of the due process of the Fourteenth Amendment.

[47] *Abbate v. U.S.*, *supra*, at 195.

[48] *U.S. v. Wheeler*, *supra*, at 320.

[49] *Id.*, citing *U.S. v. Lanza*, *supra*, at 382.

Immediately thereafter, the State of Alabama, where Heath and his wife resided and where she was kidnapped, initiated criminal proceedings against Heath for the same acts and eventually sentenced him to death. The U.S. Supreme Court reaffirmed *Bartkus, Abbate* and *Wheeler*, and held that Georgia and Alabama were separate sovereigns, and therefore the dual sovereignty exception applied. According to the Court, the controversy required the Court to determine whether the dual sovereignty doctrine allowed successive criminal proceedings under the laws of different states in situations where, ordinarily, the constitutional protection against double jeopardy would apply.[50] It explained that the dual sovereignty doctrine is triggered when the two governments derive their authority to punish from different sources.[51] Citing what was already stated in its prior opinions, the U.S. Supreme Court reaffirmed that states derive their power to prosecute those who violate their laws from what it called their "inherent sovereignty" which it characterized as follows:

> States are not less sovereign vis-à-vis each other than with respect to the federal government. Their powers to initiate criminal proceedings are derived from separate and independent sources of power and authority that

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[50] *Heath v. Alabama, supra*, at 88.

[51] *Id.*

> belonged to them before they were admitted into the Union and were preserved through the Tenth Amendment.[52]

We can see that the Court stated two reasons why it considers that states are sovereigns: they possessed an inherent sovereignty *before* they were admitted into the Union—which was preserved under the Tenth Amendment—and the distribution of powers between the states and the federal Government recognizes their sovereignty.[53] Since Georgia and Alabama are separate sovereigns, Alabama did not transgress the constitutional protections against double jeopardy when it prosecuted and sentenced Mr. Heath for the same offense to which he had pleaded guilty in Georgia. The Court held that Heath committed two separate murder offenses, because with one same act, he violated the laws of two sovereign states, violating the peace and dignity of each. In 1992, the State of Alabama executed Larry Gene Heath.[54]

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[52] *Id.* at 89.

[53] *Id.*, citing *Coyle v. Oklahoma*, 221 U.S. 559, 567 (1911). *See* Section VI of the Concurring Opinion, *infra*.

[54] Heath's death sentence was carried out on March 20, 1992. *See Alabama Executes Man Who Arranged his Wife's Murder*, The New York Times, published on March 21, 1992. Available at *http://www.nytimes.com/1992/03/21/us/alabama-executes-*

According to the U.S. Supreme Court, the states were sovereigns before they were admitted into the Union. However, its analysis regarding the sovereignty of states is inadequate from a historical standpoint as it completely ignores the process of incorporation and admission of territories as states of the Union. This process points in a very different direction.

The theory that the current state of the Union once had an "original" or "inherent" sovereignty could only be true with respect to the first states who achieved their independence from the British Empire before executing the Articles of Confederation. The states that created the Confederation committed themselves under their sovereign power and reserved for themselves all the powers not expressly delegated to the general government.[55] However, it is implausible to suggest that most of the other states that were incorporated into the Union ever enjoyed original or inherent sovereignty, since each

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man-who-arranged-his-wife-s-murder.html (last visit on February 12, 2015).

[55] A detailed account of the process through which the United States were created and developed is beyond the scope and purposes of this Opinion. Our objective is to analyze in general terms the process of colonization, incorporation and subsequent admission as federated states of the territories that the United States annexed in its process of expansion. We will thereby try to discover where such original or inherent sovereignty that the U.S. Supreme Court and the Majority of this Court attribute to the states of the Union lay, if it ever existed.

of these states' "sovereignty" originated at the time they were admitted into the Union.[56]

In the U.S. constitutional scheme, Congress has the power to admit new territories as states of the Union, pursuant to Article IV of the U.S. Constitution.[57] The law known as the Northwest Ordinance of 1787, the first of territorial laws that preceded the constitutions of many states, provided for the creation of a territorial civil government in three phases. In the last phase, the territory was allowed to draft a state constitution once the territory had reached a population and level of "Americanization" acceptable for Congress.[58]

The law forced territories to create a republican government, to protect the civil and religious freedoms of the inhabitants of the territory and to

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[56] Eric Biber, *The Price of Admission: Causes, Effects and Patterns of Conditions Imposed on States Entering the Union*, 46 Am. J. L. History 119, 121-22 (2004).

[57] "New States may be admitted by the Congress into this Union." U.S. Const., Art. IV, Section 3, cl. 1.

[58] Biber, *supra*, at 135, citing Andrew R. L. Cayton, *The Northwest Ordinance from the Perspective of the Frontier*, in the book by Robert M. Taylor, Jr., *The Northwest Ordinance 1787: A Bicentennial Handbook*, 1987 Ed. To understand the original scheme of the law, *see Northwest Ordinance* of 1787, 1 Stat. 50-53. This Law of Congress replaced the *Northwest Ordinance* of 1784. After the ratification of the United States Constitution, the *Northwest Ordinance* of 1787 was reenacted by Congress with minor changes. *See* Biber, *supra*, at 134 n.39.

always maintain themselves in the Union, subject to the limits imposed by the U.S. Constitution and the rules of their organic law.[59] Under the language of the statute, the provisions containing the obligations imposed on the territory would be known as the "articles of compact" and these could never be altered unless the consent of both parties was obtained.[60] As we can see, there was no such "original sovereignty." The territories converted into states were not free to create a government with a constitution that corresponded to their absolute will. Instead, they had to adhere to the minimum demands imposed by the United States Congress and the United States Constitution. Based on the express language of the *Northwest Ordinance*, the obligations and commitments imposed on the inhabitants of the territory through this organic law did not disappear once federal statehood was attained. That is, not even after achieving statehood were these new states freed from the restrictions imposed by the "articles of

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[59] *Northwest Ordinance* of 1787, Section 14, Articles I-VI.

[60] "It is hereby ordained and declared, by the authority aforesaid, that the following articles shall be considered as articles of compact between the original States, and the people and States in the said territory, and forever remain unalterable, unless by common consent." *Id.* Article VI of the "articles of compact" established in its last clause that the state constitution that the inhabitants of the territory were authorized to establish had to create a republican government that conformed to the articles of the "compact." As Fernós Isern would later reveal, this was the model that was used for Law 600. Trías Monge, *History*, Vol. 3, at 50.

compact" of the *Northwest Ordinance.* These would continue to apply to the new states, which were precluded from changing or repealing them.[61]

Although what was provided in the *Northwest Ordinance* of 1787 varied as the organic laws of the various territories were adopted, Congress used its main elements when it authorized the admission of several territories as states of the Union.[62] The process of admitting a new state began with Congress's approval of an enabling act or *"ley de bases"* as Trías Monge called it, establishing a procedure for the territory to hold a constitutional assembly, draft a state constitution and elect its representatives in Congress.[63] Then the state constitution was sent to Congress to review whether it met the conditions and restrictions imposed in the enabling act. If Congress understood that the state constitution met the requirements, it then issued a resolution simultaneously approving the constitution

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[61] *See* Biber, *supra*, at 132-35.

[62] *Id.* at 126 n.19.

[63] *Id.* at 127-28. These laws establish certain conditions that the territories had to meet before and even after being admitted through their adoption in the state constitutions or through "irrevocable ordinances" passed by the constitutional assemblies of the territories. *Id. See Ohio Enabling Act,* 2 Stat. 173; *Louisiana Enabling Act,* 2 Stat. 641 § 3 (1811); *Omnibus Enabling Act,* 25 Stat. 676 § 4 (1889). However, some states did not have an enabling act. Biber, *supra*, at 128 n.25.

and admitting the territory as a new state of the Union.[64]

The foregoing brief historical analysis allows us to draw two conclusions. First, the proclaimed original or inherent sovereignty of states of the Union does not exist, or at least it is very imprecise from a historical standpoint.[65] The reality is that an immense majority of territories had to go through a process of colonization and development of their territorial government before being admitted as states of the Union. In this process, the socio-cultural realities of the territories and U.S. politics played a determining role in deciding what conditions would be imposed and how long Congress's guardianship over the territory would last.[66] Therefore, the affirmation that an immense majority of the states of the Union had original or inherent sovereignty is only a juridical fiction that arises at the same time that the state is admitted into the Union.[67] Second, even after being admitted

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[64] *Id. See An Act for the Admission of the State of Louisiana*, 2 Stat. 701 (1812).

[65] *See* Biber, *supra*.

[66] *Id.* at 126. For example, California was admitted as a state of the Union almost immediately after the cession made by Mexico, while New Mexico had to wait about 60 years.

[67] The political nature of the United States government that the Majority's Opinion refers to, where sovereign power is distributed between distinguishable spheres of government—one general or federal and another local or state—does not

as states, they continue to be tied and bound by the conditions that Congress imposed unilaterally, so the U.S. Supreme Court attributes to them a sovereignty independent from that of the federal Government that is not absolute or unlimited.

It is clear that the theory of original or inherent sovereignty would only be applicable to the original thirteen states that obtained their independence from the British Empire before joining the Union. Therefore, the dual sovereignty doctrine cannot be based on the fact that the states had sovereignty before joining the Union. However, it is evident that states have independent authority to prescribe what would constitute an offense to their "sovereignty" and implement laws to punish such conduct.[68]

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change this historical reality or its implications for the dual sovereignty doctrine at all. Though this is, indeed, the political arrangement and system recognized in the country, it is still based on a juridical fiction.

[68] The Majority's Opinion, at 49, provides a brief account of the process that some of the states followed before being admitted into the Union. As explained therein, once Congress ratifies or modifies the territorial constitution, it decides whether or not it accepts the territory as a state of the Union in a subsequent process. It is asserted that "[t]hat phase of acceptance as a federated state has not occurred with Puerto Rico." *Id.* However, as we explained, the act by which Congress ratifies the constitution of a territory **is the very moment in which it is admitted** as a state of the Union, and not a subsequent act. *See* Biber, *supra*, at 128. It is true that Puerto Rico, under Law 600, was not admitted as a state of the Union, but this was due to the fact that said legislation never anticipated the admission of Puerto Rico as a state. The island

B

Indian Tribes and Congress's Plenary Power

The U.S. Supreme Court has held that the dual sovereignty doctrine allows a U.S. District Court to prosecute a member of a tribe for the same offense for which he was already tried in the courts of an Indian tribe.[69] Nevertheless, the manner in which the Court has applied this doctrine reveals the internal inconsistencies of the standard established to determine what entities may be considered sovereigns.

Although Indian tribes are physically located inside the U.S. territory and are subjected to the plenary powers of Congress, they are considered separate peoples that have the power to control their internal affairs and social relations.[70] The U.S. Supreme Court has held that Indian tribes have an inherent sovereignty that has not become extinguished, although their incorporation into the United States territory necessarily stripped them of certain sovereign attributes. Thus, Indian tribes have all the sovereign attributes that they have not

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did not, at the time, and still today, meet the criteria of assimilation and homogeneity that serve as justification for the enabling acts by which Congress usually admits new states. Biber, *supra*, at 120-21. Again, *e pluribus unum*.

[69] *U.S. v. Lara*, 541 U.S. 193 (2004); *U.S. v. Wheeler*, *supra*.

[70] *U.S. v. Wheeler*, *supra*, at 322, citing *U.S. v. Kagama*, 118 U.S. 375, 381-82 (1886).

lost through treaties or legislation, or as a necessary consequence of their status of dependence on the federal Government.[71]

The Supreme Court addressed the dual sovereignty doctrine in the context of Indian tribes in 1978, in *U.S. v. Wheeler*. A member of a Navajo Tribe was sentenced in tribal court for violating the penal code. One year later, a federal grand jury found cause to prosecute him in the U.S. District Court for the District of Arizona for the federal offense of statutory sexual assault. The defendant sought to dismiss of the indictment on the ground that the offense for which he had been sentenced by the Tribe was a lesser offense included in the federal offense. The federal court dismissed the indictment.

The U.S. Supreme Court overturned the dismissal and held that the dual sovereignty exception applies to Indian tribes, at least with respect to their authority to punish the members of their own tribe. After evaluating the dual sovereignty exception and the instances when it had upheld or invalidated its application, the U.S. Supreme Court concluded that the Navajo Tribe never waived its original sovereignty (primeval sovereignty) to punish offenses committed by members of their own tribe. Thus, "when the Navajo Tribe exercises its power, it does so as part of the

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[71] *Id.* at 322.

sovereignty it retained and not as an extension of the federal Government."[72]

In other words, the ultimate source of the tribe's power to prosecute is the "primeval" sovereignty that they possessed before they were conquered by the United States and not a delegation of authority by Congress. The fact that Congress regulates the manner and scope of the tribes' self-government does not mean that it is the source of such power.[73] Although the treaties between the tribes and the United States delegated the authority for the United States to punish members of the tribe that committed offenses against individuals, these did not eliminate the Tribe's jurisdiction to punish its own members.[74] The power to govern their internal affairs was not a delegation of authority by Congress either, because such delegation is not mentioned in the treaties or the laws.[75]

There is inherent tension between asserting that Indian tribes have sovereignty for purposes of the double jeopardy clause, while recognizing the plenary control that Congress still has over them. Although tribes are considered separate sovereigns for purposes of the dual sovereignty doctrine, by

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[72] *Id.* at 328. (Our translation).

[73] *Id.*

[74] *Id.* at 324.

[75] *Id.* at 326.

virtue of the U.S. Constitution, Congress has plenary powers to legislate over them.[76] Therefore, the sovereignty of a tribe to create and punish offenses is subject to the federal control that Congress can exercise unilaterally through legislation.[77]

The apparently paradoxical treatment given to the sovereignty of tribes did not take long to produce undesirable results. In *Wheeler*, the Supreme Court only acknowledged that when an Indian tribe punishes *its own members* it is exercising one of the powers inherent in their limited sovereignty that they never gave up. However, in *Duro v. Reina* the U.S. Supreme Court held that these vestiges of sovereignty did not authorize a tribe to prosecute members of other tribes, even if the offenses were committed within their territory.[78] In direct response to this decision, Congress legislated to recognize and affirm the inherent authority of a tribe to initiate criminal proceedings against an Indian who is not a member of the tribe.[79]

The U.S. Supreme Court analyzed this new statutory authority in the context of the dual sovereignty exception in *U.S. v. Lara*.[80] A member of

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[76] *U.S. v. Lara, supra*, at 200.

[77] *U.S. v. Wheeler, supra*, at 327.

[78] *Duro v. Reina*, 495 U.S. 676 (1990).

[79] 25 U.S.C. § 1301(2).

[80] *U.S. v. Lara, supra.*

another tribe who lived inside the territory of the Spirit Lake Tribe pleaded guilty to assault on a federal officer in tribal court. Subsequently, he was prosecuted in the U.S. District Court for the District of North Dakota for the same offense. Considering that Congress legislated to overturn the outcome of *Duro v. Reina*, in evaluating whether the federal accusation constituted a violation of the protection against double jeopardy, the U.S. Supreme Court framed the controversy to the following: What was the ultimate source of the Tribe's authority to punish Indians from other tribes, its original sovereignty or a federal delegation of authority?[81]

The statutory language of the law examined in *Lara* was carefully drafted so that it was in keeping with the rule established in *Wheeler*. The legislative history demonstrated that the statute did not delegate to the tribes jurisdiction over more individuals. Instead it recognized and affirmed that the power of tribes to punish members of other tribes insider their territory is one of the powers that tribes did not cede to the federal Government. By virtue of this statement of legislative intent, the U.S. Supreme Court concluded that the law was not a delegation of authority by Congress, but instead a valid acknowledgement of the tribe's inherent sovereignty, which can be modified pursuant to the

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[81] *Id.* at 199.

plenary powers of Congress.[82] That is, since the legislative intent was to recognize the inherent sovereignty of tribes, the law that authorizes tribes to prosecute Indians who are not members of that tribe was not a delegation of power by Congress, but rather a valid exercise of Congress's authority to alter the restrictions that political branches had imposed on the punitive power of tribes.[83]

C

Subject to the Will of the Sovereign: Territories and Cities.

Federal courts have recognized very limited exceptions to the dual sovereignty doctrine.[84] The most important exception—on which the Majority bases its reasoning today—occurs when the criminal

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[82] *Id.* at 209. In fact, in 2013, Congress granted criminal jurisdiction to tribes over individuals who are not members of any tribe. Zachary S. Price, *Dividing Sovereignty in Tribal & Territorial Criminal Jurisdiction*, 117 Col. L. Rev. 657, 668, n.40 (2013). Violence Against Women Reauthorization Act of 2013 (VAWA), Pub. L. No. 113-4, tit. IX, sec. 904.

[83] *Id.* at 199.

[84] With respect to the sovereignty of cities vis-à-vis the state they belong to, the Supreme Court has expressed that: "[a]ny power it has to define and punish crimes exists only because such power has been granted by the State, the power 'derive[s] ... from the source of [its] creation ... the judicial power to try petitioner ... in municipal court springs from the same organic law that created the state court of general jurisdiction.'" *Waller v. State of Florida*, 397 U.S. 387 (1970).

proceedings are initiated by the government of a territory of the United States and the federal Government. Since the government of a territory derives its powers from Congress, its territorial courts are nothing but an extension of such authority, so that both entities exercise the punitive power of the same sovereign, and the protections of the Fifth Amendment prevents both of them from prosecuting an individual for the same offense.[85]

The U.S. Supreme Court established that territories were not sovereigns separate from the federal Government fifteen years before it articulated the dual sovereignty doctrine in *Lanza, supra*. In *Grafton v. U.S.*, decided in 1907, a U.S. soldier was acquitted of murder in military court, but was later found guilty of the same offense by a territorial court in the Philippines. The U.S. Supreme Court reasoned that the government of the Philippines owed its existence absolutely to the will of the United States. That is, the legitimacy of the government of the Philippines depended on the jurisdiction and authority that the United States had over the archipelago, and both courts—military and territorial—exercised their powers under the authority of the same sovereign, the United States.[86] Therefore it overturned the conviction entered by the court of the territory of the Philippines because the

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[85] *Grafton v. U.S.*, 206 U.S. 333, 354 (1907).

[86] *Id.* at 354-55.

Fifth Amendment prevented the defendant from being tried twice for the same offense.[87]

In 1907, the Philippines were a U.S. territory obtained as a result of the war with Spain in 1898. At the time, the Philippines had a civil government created by virtue of the Organic Law of the Philippines of 1902, also known as the Cooper Act.[88] The Cooper Act was a congressional statute that granted a civil government to the recently annexed country and authorized it to elect a legislative assembly once all armed rebellion against the United States had ceased.[89] However, although this organic law gave the territorial legislative assembly limited legislative powers, the Congress reserved its power to unconditionally veto and annul any legislation with which it did not agree.[90] We should not be surprised then that the U.S. Supreme Court found that laws passed by the Philippine legislative assembly by virtue of the Cooper Act were in reality a power delegated by Congress, which was the source of the authority to adopt them and which retained the last word to authorize or annul them.

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[87] *Id.* at 352.

[88] 32 Stat 691.

[89] Organic Law of the Philippines, *supra*, Section 7.

[90] *Id.*, Section 86. The statute established that "all laws passed by the government of the Philippine Islands shall be reported to Congress, which hereby reserves the power and authority to annul the same." *Id.*

As we will see below, the Foraker Act of April 12, 1900, that instituted in Puerto Rico a civil government strongly subjected to the guardianship of the United States government, contained a similar provision that preserved Congress's veto power on the territorial legislature.[91] Therefore, since the territorial law—whether that enacted by the Philippines under the Cooper Act or that enacted by Puerto Rico under the Foraker Act or the Jones Act—was in reality an expression of Congress's authority, judicial proceedings in federal court or territorial court were carried out in accordance with the authority of the same sovereign, the federal Government.

It is in this historical context that we must analyze the case of *People of Porto Rico v. Shell Co.*, where the U.S. Supreme Court, in dictum, reaffirmed what was already stated in *Grafton* to the effect that the dual sovereignty doctrine does not apply in territories.[92] In *Shell Co.*, the U.S. Supreme Court analyzed the power that Puerto Rico's territorial Legislative Assembly had to pass antitrust and

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[91] 31 Stat. 77. *See* Trías Monge, *Las penas* [*The Hardships*], at 61 *et seq*. "Provided, however, that any law decreed by the Legislative Assembly shall be reported to the United States Congress, which hereby reserves the power and authority to annul the same if it deems this convenient." 1 P.R. Laws Ann., at 43. The Jones Act of 1917, which replaced the Foraker Act to provide a civil government to Puerto Rico, maintained this provision in Section 34.

[92] *People of Porto Rico v. Shell Co.*, 302 U.S. 253 (1937).

unfair competition laws, a field that was governed by the *Sherman Anti-Trust Act* of 1890.[93] The Court decided that Congress's exercise of its power to regulate commerce did not bar other initiatives on the part of States or territories regarding the same topic.

In its analysis, the U.S. Supreme Court expressed that the authorization that Section 32 of the Foraker Act, *supra,* gave the insular legislature to legislate on internal affairs included the power to create laws to penalize conspiracies to restrain commerce. Since that was not in doubt, the question was whether the territorial law and the federal law could coexist.[94] In its explanation, the U.S. Supreme Court expressed that the design of the territorial government, both in continental territories and in Puerto Rico, was devised to grant the inhabitants of the territory as many powers of self-government to deal with local affairs as were compatible with the supremacy and supervision of the federal Government, in addition to certain fundamental principles established by Congress.[95] There being no doubt that the local antitrust law and the Sherman Act could coexist, and

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[93] 15 U.S.C.A. §§ 1-7. On March 14, 1907, Puerto Rico's Legislature, constituted under the very limited powers of self-government that the Foraker Act granted, enacted a territorial law with a scope of action and application equal to that of the Sherman Act.

[94] *People of Porto Rico v. Shell Co., supra,* at 261.

[95] *Id.* at 260.

that preventing illegal contracts that could affect the economy from being executed was a legitimate local interest on which the territorial legislature could legislate, the U.S. Supreme Court held that the local law was valid. Once this was held, the U.S. Supreme Court expressed, in dictum, what had already been stated in *Grafton, supra,* that since the legislation and federal and territorial courts were created by the same sovereign—Congress—prosecution in one court with competence under the laws of either of these would, necessarily, bar prosecution under the other legislation or in the other court.[96]

In the context of *Foraker* and *Jones* organic laws, which limited the island's government and placed it practically under the control of American officials and under the strict supervision and control of Congress, it was natural to conclude that the same logic stated in *Grafton* would apply. Under the organic laws, our insular legislature's authority to legislate was clearly a delegation of powers by Congress, which had the power to veto or annul Puerto Rico's antitrust law that was in dispute in *Shell Co.* Congress stated its intent not to veto the Puerto Rican law and to allow it to be enacted and remain in effect.[97]

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[96] *Id.* at 264.

[97] This view is clearly expressed in the last paragraph of *Shell Co.*: "It is hard to see why a conflict as to which law shall be enforced and which jurisdiction shall be invoked should ever arise, since the officers charged with the administration and

In analyzing the position of the U.S. Supreme Court regarding the relationship between territories and Congress for purposes of the dual sovereignty doctrine, we have seen that when it has been denied that two sovereigns exist, the determining factor has been the lack of independence to determine what conduct constituted an offense, since the legitimacy of the territorial government and the legislation it passes depends necessarily on the powers that Congress delegated to it.[98] Clearly, the lack of authority to define criminal conduct independently is what prevented the Philippines from being considered a sovereign separate from the federal Government, since its territorial legislation could be annulled or vetoed unilaterally by Congress, which also intervened in the appointment of its principal executive officers. This very lack of independent legislative jurisdiction, not the territorial status of Puerto Rico, is what explains the Supreme Court's dictum in *Shell Co., supra.*

The historical adaptation of what was held in *Shell Co.* and the statement of sovereignty of the

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enforcement of both acts are, in the last analysis, under the control of the same sovereignty and, it well may be assumed, will work in harmony." *Id.* at 271. There is no doubt in our mind that when *Shell* was resolved in 1937, and pursuant to the doctrine expressed in *Grafton,* the understanding was that the Puerto Rican government's authority stemmed exclusively from the sovereignty that the United States exercised over the island.

[98] *Grafton v. U.S., supra,* at 352.

People of Puerto Rico established throughout our Constitution of 1952 cast doubt upon the legal grounds that led the U.S. Supreme Court to express that Puerto Rico does not possess sovereignty of its own, for purposes of the dual sovereignty doctrine.[99]

D

In summary, let us attempt to give a principled description of the concept of sovereignty for purposes of the protection against double jeopardy laid down in the Fifth Amendment, as articulated in U.S. Supreme Court case law.

As we have seen, the true sovereign both for states of the Union and for the federal Government is the People of the United States. However, it is a fundamental and unquestionable principle that for internal affairs, States and the federal Government are separate sovereigns, and therefore an analysis into the ultimate source of power must be confined to the limits imposed by U.S. federalism.

The tensions inherent by American federalism underscore that the states and the federal Government are not only distinct sovereigns, but also that they are different types of sovereigns. The federal Government is a government with enumerated powers and its scope of action is limited

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[99] *See also Córdova & Simonpietri Ins. Agency Inc. v. Chase Manhattan Bank, infra.* [Due to the change that occurred in the relationship between Puerto Rico and the United States, Section 3 of the Sherman Act no longer applies to Puerto Rico because it ceased to be a U.S. territory.]

to what is authorized under the Constitution. On the other hand, states have all the powers that were not delegated to the federal Government. This distribution of powers between the two principal political entities in the United States has fluctuated over the years, and today, they both exercise powers very different from those envisaged when the U.S. Constitution was drafted.[100] The same is true for Indian tribes, as they also possess a sovereignty qualitatively different from that of states and the federal Government. Tribes, as we explained above, are subjected to the plenary powers of Congress, yet they are still separate sovereigns for purposes of the prohibition against double jeopardy.

To that effect, sovereignty does not have to be permanent, as we have seen that the sovereignty of tribes can be broadened, restricted, created or extinguished unilaterally by Congress. Nor does it have to be absolute, as it can be subjected to the plenary powers of Congress, as in the case of tribes, or to the limits imposed by the United States Constitution on states and the federal government. Nor does it have to precede the existence of the United States, because even though the tribes and the thirteen colonies had prior sovereignty, states subsequently incorporated into the Union did not.

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[100] *See, e.g.*, the expansion of federal power through the interpretation of the commerce clause. José J. Álvarez González, *op. cit.*, at 5-6.

Moreover, if we look at the instances in which the Court has found that there was not sovereignty from a different source, we see that territories lack independent authority to create and punish offenses, as they are not only subjected to the plenary powers of Congress, but Congress can also veto local legislation and even adopt a local penal code that exceeds the enumerated powers of Congress.

It is against the foregoing backdrop that we must analyze whether the Commonwealth of Puerto Rico is a sovereign for purposes of the dual sovereignty doctrine. That is, we must examine whether Puerto Rico has sufficient authority independent from that of the federal Government to define and punish offenses autonomously.

IV

We do not intend to perform an exhaustive analysis of the more-than-a-century old juridical and political relationship between Puerto Rico and the United States, as that is not our objective. [101] Yet we

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[101] With regard to the topic of the historical, political and juridical relationship between both countries, *see* José Trías Monge, *Historia Constitucional de Puerto Rico* [*Constitutional History of Puerto Rico*], UPR Publishing, 1st Edition, 1980 (hereinafter, Trías Monge, *History*); José Trías Monge, *Puerto Rico: Las penas de la colonia más antigua del mundo* [*The Hardships of the Oldest Colony in the World*], UPR Publishing, 1st Edition, 1999 (hereinafter, Trías Monge, *The Hardships*); José Julián Álvarez González, *Derecho constitucional de Puerto Rico y relaciones constitucionales con Estados Unidos* [*Constitutional Law of Puerto Rio and Constitutional Relations with the United States*], TEMIS Publishing (2009).

need to briefly discuss that history to understand the context in which that relationship developed.

A

Annexation to the United States

The United States annexed Puerto Rico as a result of its brief war against Spain from April to August 1898. After the armistice between these two countries, the signature of the Treaty of Paris on December 10, 1898, sealed Puerto Rico's fate as an indefinite overseas possession of the United States.[102] The fact that the United States could acquire new territories by means of post-war cessions was nothing new, because in 1828, the United States Supreme Court had held that the constitutional power to declare war and formalize treaties implied the power to acquire territory by either of these means.[103]

When the United States acquired Puerto Rico as a territory in 1898, the general understanding was that annexed territories would be incorporated

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[102] *See* Trías Monge, *History*, *op cit.* Vol 1, at 146-58. Article II of the Treaty of Paris established that: "Spain hereby cedes to the United States the Island of Puerto Rico and the islands that are currently under its sovereignty...," and in the last paragraph of Article IX that "[t]he civil rights and political status of the natural inhabitants of the territories hereby ceded... shall be determined by Congress." Treaty of Paris, 1 LPRA, Historical Documents, Articles II and IX.

[103] *American Ins. Co. v. One Hundred Bales of Cotton*, 1 Peters 511 (1828).

immediately and then admitted as states of the Union.[104] Although the United States eventually annexed as states all the territories that it acquired before 1898, the territories acquired in the Treaty of Paris would have a different future.

The continuity of the continental territory facilitated the United States' process of expansion from the very beginning. This allowed the homogenization or "Americanization" of the territories that would eventually be admitted as states of the Union. Likewise, the conditions imposed on the territories were part of Congress's strategy to assimilate the society and government of the territory to the rest of American society.[105] This public policy proved to be effective, because the territories acquired before 1898 were mainly contiguous and scarcely settled, allowing U.S. colonizers to quickly populate them.[106]

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[104] *Downes v. Bidwell*, 182 U.S. 244 (1901), Concurring Op. of Justice White, pages 299-300 and 311-12. Before 1898, the United States had annexed territories through treaties that expressly provided for the incorporation of the territory: Louisiana (France, 1803); Florida (Spain, 1819); Oregon (British Empire, 1846); New Mexico, California, Colorado, Nevada, Utah and part of Arizona (Mexico, 1848); parts of New Mexico and Arizona (Mexico, 1853); and Alaska (Russia, 1857). José López Baralt, *The Policy of the United States Towards its Territories with special reference to Puerto Rico*, at 11 n.21 (1999).

[105] Biber, *supra*, at 132.

[106] López Baralt, *op. cit.*, at 86-87. (Our translation).

In addition, at the end of the Nineteenth Century and beginning of the Twentieth, the European nations had embarked on a journey to expand, conquering territories and creating colonial empires both in Africa and in Asia and the Pacific. At the time it was understood that the United States could not participate in this colonial expansion or forge its own empire if it did not have the flexibility to annex territories without this necessarily implying their incorporation.[107]

The territories acquired at that time were different form the ones previously annexed, because they had their own culture and idiosyncrasy. That is why the United States did not want to annex them as states of the Union.[108] The U.S. Supreme Court would then have to justify the United States' exercise of sovereignty over a territory without it later becoming a state of the Union, with the mutual rights and obligations that this implied. That is, it had to justify the existence of colonies within the legal and political code of the United States, a nation

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[107] Trías Monge, *The Hardships*, at 31-32.

[108] In his book, López Baralt explains that this was due to the fact that as opposed to the territories acquired by the United States before 1898, the territories acquired after 1898 "were outside the continent, and were populated by people of a different race, language and culture... There was no way they could be colonized by Americans. Under these conditions, you could hardly expect the United States to maintain its previous policy of incorporation." López Baralt, *op. cit.*, at 6-87. (Our translation).

forged by colonies who fought against the tyranny of the British Empire to defend their rights and freedoms and achieve their independence. It eventually articulated this justification, the theory of territorial incorporation, in the decisions known today as the Insular Cases.[109]

The first expression of the doctrine of territorial incorporation occurred in the concurring opinion of Justice White in *Downes v. Bidwell*, which was later adopted unanimously in *Balzac v. People of Porto Rico*. After providing a historical account of all the treaties through which the United States had annexed and incorporated territories before 1898, Justice White concludes that ever since the beginning of the United States' constitutional history, political powers understood that the incorporation of territories would not be automatic, and that the provisions of each of the treaties in question had to be followed.[110] In his analysis of the Treaty of Paris, Justice White found no language

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[109] Much has been written about the racist imperialistic tones of the Insular Cases and the social, cultural and historical context in which they were decided. *See, e.g.*, Efrén Rivera Ramos, *American Colonialism in Puerto Rico: The Judicial and Social Legacy* (2007); Cristina Duffy Burnett *et al.*, *Foreign in a Domestic Sense* (2001).

[110] *Downes v. Bidwell*, *supra*, at 319. Subsequently, the majority opinion in *Balzac* applied the same analysis.

that would indicate that Congress intended to incorporate the acquired territories.[111]

Under the theory of incorporation, territories annexed by the United States are divided into two categories: incorporated and unincorporated.[112] The inhabitants of a territory in the first category would have all the rights and privileges guaranteed by the U.S. Constitution and would be destined to eventually enter into the Union as another state. Those in the second category would belong to the United States as a possession, and their inhabitants would only have the constitutional rights that were considered fundamental, without any promise of future incorporation or statehood, and Congress could even relinquish its sovereignty over these. In order to incorporate a territory, Congress must expressly consent to the incorporation. If this intent, which cannot be inferred, is not expressly affirmed, the territory is considered unincorporated.[113]

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[111] *Id.* at 340. Associate Justice White was referring to the stipulations of the Treaty of Paris found in Articles II and IX of the Treaty. *See Downes v. Bidwell, supra*, at 318-19.

[112] *See Downes v. Bidwell, supra*, at 341-42. *See also* Trías Monge, *The Hardships*, at 56; López Baralt, *op. cit.*, at 298; and Christina Duffy Burnett and Adriel I. Cepeda Derieux, *Los casos insulares: Doctrina Desanexionista* [*The Insular Cases: The Anti-Annexation Doctrine*], 78 UPR L. Rev. 661 (2009).

[113] According to the U.S. Supreme Court, this was due to the fact that before 1898, the difference between incorporated and unincorporated territories was not important, therefore

Evidently, the racial and cultural differences of the Puerto Rican people, and the imperialistic ambitions of the time, were the elements that produced the Insular Cases and are the basis of the colonial politics that the United States established for Puerto Rico.[114] We cannot ignore these political considerations when discussing the creation of the Commonwealth of Puerto Rico and its implications for purposes of the dual sovereignty doctrine.

"[b]efore that, **the purpose of Congress might well be a matter of mere inference from various legislative acts,** but in these latter days, **incorporation is not to be assumed without express declaration, or an implication so strong as to exclude any other view."** *Balzac v. People of Puerto Rico*, *supra*, at 306. (emphasis added).

[114] Clearly, the reasons the Supreme Court had to draw up the doctrine of incorporation were political and not legal. This was demonstrated when the Court distinguished Puerto Rico's case from Alaska's:

> "It is true that in the absence of other and countervailing evidence, a law of Congress..., declaring an intention to confer political and civil rights on the inhabitants..., may be properly interpreted to mean an incorporation of it into the Union. ... But Alaska was a very different case from that of Porto Rico. It was an enormous territory, very sparsely settled, and offering opportunity for immigration and settlement by American citizens. It was on the American continent and within easy reach of the then United States."

Balzac v. People of P[ue]rto Rico, *supra*, at 309. *See also* López Baralt, *op. cit.*, at 296.

B

Immediate Antecedents of Law 600 and the Debate on Puerto Rico's Constitution

When it became a territory of the United States, Puerto Rico was governed by a military government and later by a civil government of limited powers.[115] In 1917, Congress enacted the Jones Act, altering the territorial government to increase the insular government's degree of autonomy. However, Congress maintained the government of Puerto Rico under federal control, appointing its Governor and reserving its right to veto or annul local legislation and legislate directly on the subject matter.[116]

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[115] Foraker Act. *See* Trías, *History*, Vol. 2, at 102.

[116] The *Jones Act* created a territorial government for the island with a Governor appointed by the President with the advice and consent of the U.S. Senate; seven insular departments, of which two of their executives, the Commissioner of Education and the General Advocate, would be appointed by the President with the advice and consent of the U.S. Senate until 1947, and an insular legislature, with a House of Representatives and a Senate whose members would be elected by qualified voters of Puerto Rico. All the local legislative powers fell upon the Legislative Assembly of Puerto Rico, except for those specifically laid down by Congress by law. *See* Trías Monge, *History, op. cit.*, Vol. 2, at 93. The legislation considerably strengthened the powers of the Governor, who was appointed by the federal Government, increasing the power and influence of the Federal Bureau of Insular Affairs and the Department of Defense on the insular government, as they oversaw his work directly. *Id.* at 92. Furthermore, under the

Therefore, when the U.S. Supreme Court addressed Puerto Rico's sovereignty and the dual sovereignty doctrine in *Shell Co., supra*, the federal Government supervised and exercised strict control over the internal affairs of Puerto Rico. As in the case of the Philippines in *Grafton, supra*, under the regime of the *Jones Act*, the government of Puerto Rico was clearly an extension of Congress's authority, as Congress was its ultimate and unappealable legislator, even over internal affairs, with complete prescriptive and legislative jurisdiction over the island.

Law 600 also arose in a context very different from that of the prior organic laws that the United States had enacted for its territories. At the end of World War II, in 1945, the Charter of the United Nations was adopted to establish a new international organization to promote peace and security after the failure of the former League of Nations.[117] Article 73 of the Charter laid down the then new international

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Jones Act, once the session of Puerto Rico's Legislative Assembly had ended, the Governor of Puerto Rico had the obligation to send all legislation passed by the Assembly to the government of the United States, which, in turn, transmitted it to Congress. *Jones Act, supra*, Art. 23. Congress could simply annul or veto it and directly legislate on the subject matter. *Id.*, Art. 34. *See* Trías Monge, *History, op. cit.*, Vol. 2, at 100.

[117] United Nations, Charter of the United Nations, October 24, 1945, 1 UNTS XVI, available at: *http://www.un.org/es/documents/charter/* (last visited on January 22, 2015).

rule against the absolute power of a nation over the government of other people or territories that have not yet "attained a full measure of self-government."[118] Said article imposed on colonizing countries the duty to protect the culture of the peoples concerned and to promote their developing self-government as soon as possible.[119]

There is no doubt that the foregoing international rule applies to the case of Puerto Rico: our archipelago is a Caribbean nation from a sociological-cultural standpoint, possessing all the attributes of a distinct culture, with a language and idiosyncrasies of our own that differentiate us from any other nation.[120] That is why Article 73 of the Charter of

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[118] Article 73, Chapter XI, Charter of the United Nations, *supra*.

[119] The right of self-determination of the people was later ratified by resolutions 1514 (XV) and 1541 (XV). G.A. Res. 1514 (XV), of December 14, 1960; G.A. Res. 1541 (XV), of December 15, 1960. *See* José J. Álvarez González, *Law, Language and Statehood: The Role of English in the Great State of Puerto Rico*, 17 L. and Inequality 359, 384, n.114-15 (1999).

[120] According to Trías Monge, by the end of the Nineteenth Century, Puerto Rico had a well-defined national identity and a profound sentiment for its own culture. Trías Monge, *The Hardships*, at 19-20. According to Professor Álvarez González, "[u]nder any reasonable definition, Puerto Rico is a nation, with a separate culture, a distinct personality and a characteristic language ... [t]he concept of nationality is cultural and sociological." Álvarez González, *The Great State*, *supra*, at 383, 385. The Puerto Rico Supreme Court has made statements reiterating Puerto Rico's status as a nation. *See Ramírez de*

the United Nations, and Resolutions 1514 (XV) and 1541(XV) apply, for example, to Puerto Rico and the Mariana Islands, and not to Florida or Oregon. The last times that the United States Congress has attempted to fully deal with the political status of Puerto Rico, it has expressly recognized its right to self-determination pursuant to international law[121] and the Decolonization Committee of the United Nations has exercised jurisdiction over Puerto Rico's case since 1973.[122]

With this background, we proceed to examine the passing of Public Law 600 in 1950 and the creation of the Constitution of the Commonwealth of Puerto Rico. The nature and purpose of Law 600 went beyond the organic laws that preceded it, the

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Ferrer v. Marí Brás, *infra*, Concurring Opinion of Chief Justice Hernández Denton, at 253. [Such citizenship of Puerto Rico was originally conferred by the U.S. Congress in response to the obvious fact that the Puerto Rican peoples were a people with customs, habits and traditions different from those of the American peoples. That is, the citizenship of Puerto Rico is the legal expression of a sociological fact: Puerto Rico is in the eyes of the world, a nation.] *See also* the expressions of Associate Justice Negrón García in *De Paz Lisk v. Aponte Roque*, 124 P.R. Dec. 472, 507 (1989).

[121] Álvarez González, *The Great State*, *supra*, at 382. *See also* S. 712, 101st Cong. (1990) [The United States of America recognizes the principle of self-determination and other applicable principles of international law with respect to Puerto Rico]; and H.R. 856, 105th Cong. (1998), cited in Álvarez González, *The Great State*, *supra*, at 382, n.111.

[122] Trías Monge, *The Hardships*, *op. cit.*, at 175-76.

Foraker Act and the Jones Act. Evidently, the purpose was not to create another organic law for Puerto Rico. This was a piece of legislation that sought to satisfy the demands presented for many years by all the political forces on the island and that still had not been satisfied.

Public Law 600 authorized the People of Puerto Rico to elect delegates for a Constitutional Assembly that was to draft a constitution that would establish a republican government and include a bill of rights.[123] According to the very terms of Law 600, it was established in view of the acknowledgement of the "principle of government by consent of the governors" and as a "compact."[124] In that sense, Law 600 was a mechanism similar to the one that Congress used to authorize incorporated territories to create their own constitution and annex them as states of the Union.

With the passing of Law 600, the U.S. Congress and Government lost complete and effective control to administer the internal affairs of the island, and these were left exclusively in the hands of Puerto Ricans and subject only to what is provided in the U.S. Constitution, Law 600, the Federal Relations Act and the Constitution of Puerto Rico.[125] That is,

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[123] Law 600, 64 Stat. 314, art. 2.

[124] *Id.*, Art. 1.

[125] Once Puerto Rico's constitution took effect, several articles of the Jones Act became the "Federal Relations with

the Constitution of Puerto Rico would be limited to the conditions imposed by Congress unilaterally, in a manner similar to when incorporated territories enact their constitutions, pursuant to the limits imposed by their "enabling acts."

Having contextualized the environment in which Law 600, *supra*, was legislated and authorized and cognizant of both the nature of the United States' colonial politics regarding its territories and the real reasons for implementing them, we are in a better position to understand what happened between 1950-1952. The Opinion issued today by the Court places great emphasis on the expressions made both by Puerto Rico's representatives and the members of Congress who participated in the debate to pass Law 600 and the Constitution of the Commonwealth of Puerto Rico.[126] Clearly, if we analyze these expressions outside the context in which they were made, we can easily arrive at the conclusion that Puerto Rico did not alter its status as a territory completely subordinated to the will of Congress. However, the objective of the expressions made by

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Puerto Rico Act." Id, Art. 4. However, Articles 12, 23 and 34 of the Jones Act, *Id.*, Article 5, were automatically repealed. When Article 34 was repealed, Congress's power to annul local laws was eliminated. It would be illogical to think that Congress intended to retain all of its legislative power over Puerto Rico, which it had under the Jones Act, when at the same time it was repealing the legal framework that allowed it to do so expressly.

[126] Maj. Op. at 41-45.

U.S. congressmen during the debates in Congress was to prevent Law 600 from being interpreted as an incorporation of the territory of Puerto Rico, because that would imply that eventually Puerto Rico would have to be admitted as a state of the Union. As we will see, the creation of the Commonwealth of Puerto Rico was not the futile and insignificant exercise that the detractors of the current model of government insist it represented.

According to the positive reports of the Senate and Congress, focused on the specific language of *Balzac* and the territorial incorporation doctrine, the new Law 600 could by no means be interpreted as a law that incorporated Puerto Rico into the United States, but at the same time it clearly states that it is intended to grant Puerto Rico as much power as possible over its internal affairs. When it adopted its Constitution, Puerto Rico would have complete legislative authority, becoming the sole and ultimate legislator of its internal affairs. Such was the understanding demonstrated by the debate held in Congress when Law 600 was passed.

C

The new constitution was drafted between September 17, 1951, and February 6, 1952, when it was passed by 81 of the 92 delegates of the Constitutional Convention.[127] President Truman's

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[127] *Id.* at 145-46. Puerto Rican voters ratified the new constitution on March 3, 1952. On March 12, 1952, it was sent

statement in his letter sending the new constitution to Congress leave no room for doubt as to the new authority attained by Puerto Rico: "When passed, [the constitution] vests in the people of Puerto Rico complete authority and responsibility for local self-government."[128] When the new constitution was ratified by Congress, it was reiterated that the political relations between Puerto Rico and the United States remained unaltered. In the process, Congress demanded that Section 20 of the new constitution be eliminated and that the provision regarding mandatory education be clarified.[129] These conditions were approved by the Constitutional Convention on behalf of the People of Puerto Rico; and on July 25, 1952, the Constitution of the Commonwealth of Puerto Rico took effect.

As we have noted from the outset, it is not our purpose to definitively establish the meaning of the process that the Puerto Rican People and the U.S. Congress carried out during the 1950's. Nor is the resolution of that controversy incumbent on us.[130]

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to President Truman for him to, in turn, transmit it to Congress, which was done on April 22, 1952.

[128] *Id.* at 146.

[129] *Id.* at 148-49.

[130] As this Court held in *Ramírez de Ferrer v. Marí Brás*, "[t]he matter of whether the relationship between Puerto Rico and the United States ceased to be of a colonial nature under the Commonwealth, is clearly not for us to resolve. This is

However, the drafting and ratification of our Constitution by the People of Puerto Rico was not a marginal and insignificant event, as the Majority insists, basing itself on an unreal and obsolete definition of sovereignty. With the passing of the Constitution of 1952, Puerto Rico demanded and obtained sovereignty over its internal affairs. Nothing in the legislative history of the passing of Law 600 and the Constitution of the Commonwealth by Congress suggests that Puerto Rico did not attain sufficient sovereignty for purposes of the dual sovereignty doctrine.[131]

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mainly up to the political sphere." *Ramírez de Ferrer v. Marí Brás, supra*, at 192.

[131] To the contrary, the legislative history demonstrates that what concerned the congressmen was that Law 600 should not be interpreted as an incorporation of Puerto Rico to the United States, with the mandatory promise of admission as a state that this would entail. In fact, even the expressions made during the ratification hearings for the Commonwealth's Constitution held in the U.S. Senate go against this theory. The words of congressman Lloyd M. Bentsen, member of the House of Representatives' Committee that reviewed the Commonwealth's Constitution, answering Congressman Meader, who asked him if with the passing of the constitution "Congress ... would have made an irrevocable delegation of authority to Puerto Rico, similar to that granted when we admit a State into the Union," show the scope of sovereignty that the bill conferred on Puerto Rico. Bentsen answered, "Yes. In my interpretation, I think we are doing that. I think that is what we should be doing for Puerto Rico, because I think they have shown a great deal of economic and political progress. I see no reason why we should treat them as a vassal or serf." Trías Monge, *History, op. cit.*, Vol. 3, at 292. Another sign of the level

After Puerto Rico's constitution was passed, the Commonwealth of Puerto Rico's ultimate source of power and authority to create and punish crimes has been the People of Puerto Rico.

Of course, this sovereignty is not absolute, nor is that of the federal Government, the states of the Union, the tribes or the rest of the political communities in the United States' federal system. The fact that Puerto Rico can be subjected to the plenary power of Congress, even after the Constitution of the Commonwealth of Puerto Rico was passed, something the U.S. Supreme Court has never established and which, as we will see,is contrary to the interpretation made by the U.S. Court of Appeals for the First Circuit, does not prevent us from affirming, pursuant to the

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of internal authority or "sovereignty" that Congress intended to grant Puerto Rico by passing the Commonwealth's Constitution is found in the expressions of Frances Bolton, Congressman for Ohio, who participated in the process of passing the laws that led to the creation of the Commonwealth of Puerto Rico before the United Nations on November 3, 1953, during the process followed to discharge the United States form its obligation to submit reports about Puerto Rico under Article 73 of the Charter of the United Nations. Bolton expressed, "The nature of the relations established by compact between the people of Puerto Rico and the United States, far from preventing the existence of the Commonwealth as a fully self-governing entity, *gives the necessary guarantees for the untrammeled development and exercise of its political authority. The authority of the Commonwealth of Puerto Rico is not more limited than that of any State of the Union; in fact, in certain aspects it is much wider.*" *See Ramírez de Ferrer v. Marí Brás, supra*, at 167.

responsibility delegated to us by the People, that Puerto Rico is a sovereign for purposes of the dual sovereignty exception.[132]

The fact that the autonomy and sovereignty of Puerto Rico over matters not governed by the U.S. Constitution is comparable to that of the states since the Constitution of the Commonwealth was passed means that Puerto Rico, just as the states, has absolute power to legislate on its internal affairs to the same extent as any state of the Union.[133] For this reason, it is important to briefly analyze how the federal courts and also this Supreme Court have interpreted the powers of Puerto Rico under its constitution.

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[132] As we already saw, in *U.S. v. Lara*, "Congress, with this Court's approval, has interpreted the Constitution's "plenary" grants of power as authorizing it to enact legislation that both restricts and, in turn, relaxes those restrictions on tribal sovereign authority." *Lara*, *supra*, at 202. The U.S. Supreme Court went even further when it stated that the plenary power and control of Congress over Indian tribes was so broad that it could even terminate the existence of the tribes and then resuscitate them. *Id.* at 203. Certainly, if the "inherent" sovereignty of the states of the Union and of Indian tribes are comparable, this gives rise to serious doubts as to the meaning of "sovereignty" in the context of the protection against double jeopardy and the dual sovereignty exception.

[133] *Rodríguez v. Popular Democratic Party*, 457 U.S. 1, 8 (1982), citing *Calero Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 673 (1974) (Our translation).

V

During the first years after the Constitution of the Commonwealth took effect, the U.S. Supreme Court was silent about the new legal structure of the island.[134] For this reason, the first interpretations of the nature of the Commonwealth Constitution and the changes that it entailed in the relationship between Puerto Rico and the United States can be found in the decisions issued by the U.S. Court of Appeals for the First Circuit.

Federal Judge Salvador E. Casellas points out in his article, *Commonwealth Status and the Federal Courts*, that "since 1952, it has been a well-established legal rule in the First Circuit that, with the creation of the Commonwealth in 1952, Puerto Rico ceased to be a territory of the United States subject to the plenary powers of Congress as provided in the federal Constitution."[135] In fact, Puerto Rico's new political relationship with the United States was acknowledged at least eleven times by the federal District Court for Puerto Rico during the period between 1952 and 1970.[136] At the

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[134] Álvarez González, *Derecho Constitucional de Puerto Rico*, *supra*, at 473.

[135] Salvador E. Casellas, *Commonwealth Status and the Federal Courts*, 80 Rev. Jur. UPR 945, 954 (2011), "Since then, the authority exercised by the federal government emanates from the compact executed by and between the People of Puerto Rico and the United States Congress." *Id.* (Our translation).

[136] *Mora v. Torres*, 113 F Supp. 309 (D.P.R. 1953); *Mora v. Mejías*, 115 F. Supp. 610 (D.P.R. 1953); *Consentino v. ILA*, 126

First Circuit level, it was established on four occasions prior to 1960 that Puerto Rico had reached, under the Commonwealth Constitution, a new political status whereby Congress no longer exercised plenary power over the island.[137]

A

The Decisions of the First Circuit

In *Mora v. Mejías*, the U.S. Court of Appeals for the First Circuit (hereinafter the First Circuit), addressed a controversy involving the unconstitutionality of a Puerto Rico law authorizing the Puerto Rico Secretary of Agriculture and Commerce to control the price of rice.[138] As part of the controversy, the First Circuit had to analyze whether Puerto Rico was a "state" for purposes of

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F. Supp. 420 (D.P.R. 1954); *Carrión v. González*, 125 F. Supp. 819 (D.P.R. 1954); *Mitchell v. Rubiom*, 139 F Supp. 379 (D.P.R. 1956); *U.S. v. Figueroa-Ríos*, 140 F. Supp. 376 (D.P.R. 1956); *Alcoa Steamship Co. v. Pérez*, 295 F Supp. 187 (D.P.R. 1968); *U.S. v. Valentine*, 288 F. Supp. 957 (D.P.R. 1968); *Liquilux Gas Services of Ponce, Inc. v. Tropical Gas Co.*, 303 F. Supp. 414 (D.P.R. 1969); *U.S. v. Feliciano-Grafals*, 309 F. Supp. 1292 (D.P.R. 1970); *Long v. Continental Casualty Co.*, 323 F. Supp. 1158 (D.P.R. 1970).

[137] *Mora v. Mejías*, 206, F.2d 377 (1st Cir. 1953); *Figueroa v. People of Puerto Rico*, 232 F.2d 615, 620 (1st Cir. 1956); *Moreno Ríos v. U.S.*, 256 F.2d 68 (1st Cir. 1958) and *Sánchez v. U.S.*, 256 F.2d 73 (1st Cir. 1958).

[138] *Mora v. Mejías*, 206 F.2d 377, 379 (1st Cir. 1953). This decision is particularly important because it was subsequently cited with approval by the U.S. Supreme Court on two occasions.

section 2281, which seeks to avoid undue interference by the federal courts with the laws of a state, given that states are "sovereigns over matters not ruled by the Constitution."[139] If Puerto Rico was considered a state for purposes of said section, only a District Court made up of three judges could order the injunction requested by plaintiffs.

The First Circuit concluded that, under the Jones Act, section 2281 clearly did not apply to Puerto Rico, since the island was then a territory of the United States.[140] However, it held that Puerto Rico, organized after 1952 as a political entity under its own constitution established pursuant to the terms of the "compact" of Public Law 600, could be a "state" for purposes of section 2281.[141] The Opinion states that:

> [i]f the constitution of the Commonwealth of Puerto Rico is really a "constitution"—as the Congress says it is, 66 Stat. 327,—and not just another Organic Act approved and enacted by the Congress, then the question is whether the Commonwealth of Puerto Rico is to be deemed 'sovereign over matters not ruled by the Constitution' of the United States and thus a 'State'

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[139] 28 U.S.C. § 2281. *Mora v. Mejías*, *supra*, at 387.

[140] *Id.* at 387.

[141] *Id.*

> within the policy of 28 U.S.C. § 2281 ....[142]

Although the opinion does not answer the question—believing that said controversy warranted the benefit of having the briefs of the parties—its text clearly suggests that it would have answered the question in the affirmative.[143]

Likewise, there is no question that the First Circuit believes that there was an important change in terms of Puerto Rico's authority over its internal matters as a result of the enactment of the Constitution of the Commonwealth.[144] The opinion

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[142] *Id.*

[143] "A serious argument could therefore be made that the Commonwealth of Puerto Rico is a State within the intendment and policy of 28 U.S.C. Sec. 2281." *Id.* at 387. Additionally, as we will see, the U.S. Supreme Court stated in *Rodríguez v. Popular Democratic Party* that "Puerto Rico, like a state, is an autonomous political entity, 'sovereign over matters not ruled by the Constitution." *Id.* at 8.

[144] *U.S. v. Bonilla Romero*, 836 F.2d 39 n.2 (1st Cir. 1987). As we stated in *Ramírez de Ferrer v. Mari Brás*, after 1970 the federal District Court and the First Circuit reiterated time and again "the scope of government authority that belongs exclusively to the Commonwealth." *Ramírez de Ferrer v. Mari Brás, supra*, at 161. Among these cases are: *Sánchez v. U.S.*, 376 F Supp. 239 (D.P.R. 1974); *García v. Friesecke*, 597 F.2d 284 (1st Cir. 1979); *First Fed. S. & L., Etc. v. Ruiz De Jesus*, 644 F.2d 910 (1st Cir. 1981); *Cordova & Simonpietri Ins. v. Chase Manhattan Bank*, 649 F.2d 36 (1st Cir. 1981); *Cintrón-García v. Romero Barceló*, 671 F.2d 1 (1st Cir. 1982); *Enrique Molina-Estrada v. Puerto Rico Hwy. Auth.*, 680 F.2d 841 (1st Cir. 1982); *U.S. v. Quiñones*, 758 F.2d 40 (1st Cir. 1985); *U.S. v. López*

of the First Circuit in *Córdova & Simonpietri Ins. Agency Inc. v. Chase Manhattan Bank* is particularly important to the case at hand since, as in *Shell Co.*, the application of the Sherman Act in Puerto Rico was in controversy. In his opinion, Judge Stephen Breyer, now Associate Justice of the U.S. Supreme Court, outlined the controversy in the following terms:

> The ... question that this case presents is whether section 3 of the Sherman Act applies to Puerto Rico... The Supreme Court, in 1937, specifically held that section 3 applied to Puerto Rico. But, in 1951 Congress passed the Puerto Rican Federal Relations Act, 64 Stat. 319, ("FRA") pursuant to which Puerto Rico adopted its own Constitution. Does the coming into effect of the FRA and this Constitution mean that certain federal acts, such as the Sherman Act, which apply within territories but not within states, can no longer be given greater

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Andino, 831 F.2d 1164 (1st Cir. 1987); *Camacho v. Autoridad de Teléfonos de P.R.*, 868 F.2d 482 (1st Cir. 1989); *Romero v. U.S.*, 38 F.3d 1204 (Fed. Cir. 1994); *Reeser v. Crowley Towing & Transp. Co.*, 937 F. Supp. 144 (D.P.R. 1996); *U.S. v. Vega Figueroa*, 984 F Supp. 71 (D.P.R. 1997).

> effect as applied to Puerto Rico than as applied to states of the Union?[145]

The First Circuit stated that the Federal Relations Act and the Constitution of the Commonwealth "had the intention of effecting significant changes in the relationship between Puerto Rico and the rest of the United States. [146] Without a doubt, prior to the adoption of these laws, Puerto Rico's relationship with the United States was closer to that of a Territory than of a State. [147] After a quick analysis of the process of passing and enacting the Constitution of the Commonwealth, the First Circuit reached the following conclusion:

> **In sum, Puerto Rico's status changed from that of a mere territory to the unique status of Commonwealth**. And the federal government's relations with Puerto Rico changed from being bounded merely by the territorial clause, ... As the Supreme Court has written, **"the purpose of Congress** in the 1950 and 1952 legislation **was to accord**

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[145] *Córdova & Simonpietri Ins. v. Chase Manhattan Bank*, *supra*, at 38.

[146] *Id.* at 39.

[147] *Id.* at 40. The Opinion mentions, as an example of the absolute power that Congress had over the territory, the fact that "Congress insisted that acts of the Puerto Rico Legislature be reported to it, retaining the power to disapprove them." *Id.* at 39.

> **to Puerto Rico the degree of autonomy and independence normally associated with a State of the Union."**[148]

As a result, after the enactment of the Federal Relations Act and of the Constitution of the Commonwealth, section 3 of the *Sherman Act* no longer applied to Puerto Rico.[149]

It is clear, then, that the rule established in the First Circuit is that with the enactment of the Puerto Rico Constitution, there was a significant change in terms of the internal authority of the island. In fact, just as acknowledged in the majority opinion, the First Circuit has already held that Puerto Rico is a sovereign for purposes of the doctrine of dual sovereignty.[150] Other federal courts of appeals,

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[148] *Id.* at 41 (emphasis added) (citation omitted).

[149] *Id.* at 44.

[150] Maj. Op. at 29. In *U.S. v. López Andino*, the First Circuit concluded the following: "The question before us, therefore, is whether Puerto Rico and the United States are "two sovereigns" for purposes of double jeopardy. Two entities [that prosecute a citizen] are understood to be separate for purposes of [the protection] against double jeopardy when they derive their power from different sources. [Citations omitted]. It has been well-established [by caselaw] that when the states enact their own criminal laws, they act pursuant to their own sovereign power, [and] not that of the national government. [Citation omitted]. The status of Puerto Rico is not that of a state of the federal Union, but its criminal laws, like those of the states, emanate from [a] source different from the federal Government." *López Andino*, *supra*, at 1167-68. (Our translation). *López Andino* is just one more in the list of cases

particularly the Court of Appeals for the Third Circuit and the Court of Appeals for the Federal Circuit, have followed the rule established by the line of cases of the First Circuit.[151] For this reason, the decision of the Court of Appeals for the Eleventh Circuit in *U.S. v. Sánchez*, which is given so much weight by the Majority Opinion, is no more than an isolated exception the well-established rule that Puerto Rico is as sovereign as the states in matters that are not controlled by the federal Constitution.[152]

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of the First Circuit that have recognized to the Commonwealth an authority equal to that of the states of the Union for many purposes.

[151] "Puerto Rico possesses a measure of autonomy comparable to that possessed by the States"; and "Congress maintains similar powers over Puerto Rico as it possesses over the federal states." *U.S. v. Laboy-Torres*, 553 F.3d 715, 722 (3rd Cir. 2009); "On July 3, 1952, Congress approved the proposed Constitution of the Commonwealth of Puerto Rico, which thenceforth changed Puerto Rico's status from that of an unincorporated territory to the unique one of Commonwealth." *Romero v. United States*, 38 F.3d 1204, 1208 (Fed. Cir. 1994).

[152] *U.S. v. Sánchez*, 992 F.2d 1143 (11th Cir. 1993). Judge Casellas explained that "[i]n doing so, [*US v. Sánchez*]—which is not binding and does not constitute precedent for the First Circuit—completely disregarded the long line of decisions which the First Circuit has rendered since 1953, and which the Supreme Court has issued since 1974, regarding the constitutional status of the Commonwealth .... To the extent that it viewed Puerto Rico as a territory without sovereignty, *Sánchez* is an isolated case and does not modify the long-held and well-settled doctrine regarding the constitutional nature of the Commonwealth of Puerto Rico." Casellas, *supra*, at 959 n. 75.

B

The New Constitution before the U.S. Supreme Court

The United States Supreme Court addressed the nature of the Commonwealth in 1974, when it published its opinion in *Calero-Toledo v. Pearson Yacht Leasing Co., supra.* Like the First Circuit in *Mora v. Mejías, supra*, the U.S. Supreme Court faced the question of whether the laws of Puerto Rico could be considered "state" laws for purposes of § 2281.[153]

After a brief analysis of the relationship between Puerto Rico and the United States, the Court stated the following:

> we believe that the established federal judicial practice of treating enactments of the Commonwealth of Puerto Rico as "State statute(s)" for purposes of the *Three-Judge Court Act*, serves, and does not expand, the purposes of sec. 2281.[154]

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[153] *Calero-Toledo v. Pearson Yacht Leasing Co., supra*, at 670. Specifically challenging a Puerto Rico law whereby the Government seized a luxury yacht that had been used to transport drugs to the island. After *Stainback v. Mo Hock Ke Lok Po* it was clear that, regarding the laws enacted by a territory, there were no federal reasons to apply sec. 2281 if attempting to invalidate a territorial statute. *Calero-Toledo, supra*, at 670-671, citing *Stainback v. Mo Hock Ke Lok Po*, 336 U.S. 368, 377 (1949).

[154] *Id.* at 675.

To reach this decision, the U.S. Supreme Court took into account the fact that the federal lower courts had established, since 1953, that Puerto Rico must be considered sovereign regarding matters that are not ruled by the federal Constitution.[155] The U.S. Supreme Court emphasized that in *Wackenhut Corp. v. Aponte*, a 1967 decision, it was established that the doctrine of judicial abstention was particularly appropriate regarding the legislation enacted by the Commonwealth, so that said new political entity would be the one to determine, based on the "compact" that it had reached with Congress, the scope and validity of its own legislation pursuant to the Constitution of the Commonwealth and the Constitution of the United States.[156]

The next time that the U.S. Supreme Court expressed itself on the nature of the Commonwealth was issued in *Examining Board of Engineers,*

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[155] *Id.* at 674. (Our translation).

[156] *Id.* Before reaching this conclusion, the U.S. Supreme Court had cited *Mora v. Mejías, supra*, in that "[t]he preamble to this constitution refers to the Commonwealth ... which 'in the exercise of our natural rights, we (the people of Puerto Rico) now create within our union with the United States of America' Puerto Rico has thus not become a State in the federal Union like the 48 States, but it would seem [to] have become a State within a common and accepted meaning of the word. [Citation omitted] ... It is a political entity *created by the act and the consent of the people of Puerto Rico* and joined in union with the United States of America under the terms of the compact." *Calero-Toledo, supra*, at 672, citing *Mora v. Mejías, supra.* (emphasis added).

Architects & Surveyors v. Flores de Otero.[157] The dispute in that case involved the lawfulness of a Puerto Rico law that required U.S. citizenship in order to practice engineering.[158] *Citing Calero-Toledo, supra,* the U.S. Supreme Court reiterated that:

> the purpose of Congress in the 1950 and 1952 legislation was to accord to Puerto Rico the degree of autonomy and independence normally associated with States of the Union, and accordingly, Puerto Rico "now elects its Governor and legislature; appoints its judges, all cabinet officials, and lesser officials in the executive branch; sets its own educational policies; determines its own Budget' **and amends its own civil and criminal codes."**[159]

Following a brief summary of the approval of the compact between Puerto Rico and Congress,[160] the Court stated that even though Puerto Rico, like the District of Colombia, occupied an exceptional place

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[157] *Examining Board of Engineers, Architects and Surveyors v. Flores de Otero*, 426 U.S. 572 (1976).

[158] *Id.* at 577.

[159] *Id.* at 594. (Emphasis added)

[160] *Id.* at 593. [The condition was accepted, the compact became effective, and Puerto Rico assumed "Commonwealth" status.]

within the federal system, that did not mean that it had been Congress' intention to exclude the Commonwealth from section 1983, under which the law in controversy in *Flores Otero* had been challenged.[161] Since Congress lacks the means to oversee state and territorial officials, the federal courts must have the jurisdiction to intervene. To those effects, the Court explained that:

> [t]he same practical limitations on Congress' effectiveness to protect the federally guaranteed rights of the inhabitants of Puerto Rico existed from the time of its cession and, after 1952, **when Congress relinquished its control over the organization of the local affairs of the island** and granted Puerto Rico a measure of autonomy comparable to that possessed by the States, the need for federal protection of federal rights was not thereby lessened.[162]

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[161] *Id.* at 595-96. Section 1983 grants a federal court jurisdiction over controversies where it is alleged that a state or territory official, "under the appearance of authority" has denied a U.S. citizen a right, privilege or immunity guaranteed by the federal Constitution or the laws of the United States. 42 U.S.C. § 1983.

[162] *Id.* at 596-97 (emphasis added). To understand the difficulty that the U.S. Supreme Court faced when analyzing whether after 1952 the federal courts had jurisdiction pursuant to sec. 1983 over acts carried out by Puerto Rico officials, we must remember that said statute refers to "states" or

As both decisions point out, after 1952, control over local Puerto Rico matters was in the hands of the Commonwealth, since Congress had relinquished control over the internal matters of the island. [163] Since then, Puerto Rico is a "sovereign in matters not ruled by the Constitution."[164]

In the summer of 1982, two additional decisions affirmed the rule that granted the Commonwealth all of the sovereign powers associated with the states of the Union in internal matters. The first of them, *Rodríguez v. Popular Democratic Party*, analyzed the authority of the Commonwealth of Puerto Rico to regulate its electoral matters.[165] After reiterating

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"territories." Because Puerto Rico could no longer be classified as either due to its "unparalleled relationship with the United States," the U.S. Supreme Court resorted to a practical or functional approximation: since sec. 1983 expressly applies to both states and territories, Puerto Rico had to fall somewhere between the two, and since Congress had not made any expression eliminating the jurisdiction of the federal courts under section 1983 when the Commonwealth was created, then section 1983 had to apply to Puerto Rico. *Id.* at 597. For the same practical reason, the U.S. Supreme Court did not define whether the protection of the rights of the inhabitants of Puerto Rico was guaranteed under the Fifth Amendment of the federal Constitution or under the Fourth. *Id.* at 600-01.

[163] *Id.* at 597.

[164] *Calero-Toledo*, *supra*, at 674. (Our translation)

[165] At issue was a Puerto Rico law that authorized a political party to fill a vacancy in the Legislative Assembly left by a legislator affiliated to said party if said legislator died, resigned or was removed from the position. *Rodríguez v. Popular Democratic Party*, *supra*, at 6.

that the constitutional rights of the inhabitants of Puerto Rico are protected by the guarantees of the due process of law and the equal protection of the laws, the U.S. Supreme Court stated the following regarding the Commonwealth and its political authority:

> **At the same time, Puerto Rico, like a state, is an autonomous political entity, "sovereign over matters not ruled by the Constitution."** The methods by which the people of Puerto Rico and their representatives have chosen to structure the Commonwealth's electoral system are entitled to substantial deference.[166] [Citations omitted]

In the second case decided that summer, *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, the U.S. Supreme Court had to determine whether Puerto Rico had the authority granted to the states to defend the rights granted to its citizens by federal legislation.[167] The

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[166] *Id.* at 8 (emphasis added).

[167] *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592 (1982). The Secretary of the Department of Labor and Human Resources of the Commonwealth filed suit against a group of apple farmers in the State of Virginia, alleging that they had discriminated against Puerto Rican workers that had been sent to work to said state pursuant to the federal Wagner-Peyser Act. *Id.* at 594. Said act established a system to alleviate the high unemployment rate existing in some states during the Great Depression. With that system, the state offices

controversy was framed within the *parens patriae* rights of the states to vindicate, not their own sovereign rights, but the rights of their citizens when the violation of said rights somehow affects the quasi-sovereign interests of the state.[168] However, there are two statements by the U.S. Supreme Court in said case that are important to our controversy. First, the Court identified two sovereign interests possessed by the states of the Union:

> Two sovereign interests are easily identified: First, **the exercise of sovereign power over individuals** and entities within the relevant jurisdiction—**this involves the power to create and enforce a legal code, both civil and criminal;** second, the demand for recognition from other sovereigns—most frequently this involves the maintenance and recognition of borders.[169]

The Court then explained that the quasi-sovereign interests of the states can be divided into two general categories: the protection of the health

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authorized by the U.S. Secretary of Labor identified whether they needed labor from outside the state for specific industries, and that labor was then supplied by workers from other U.S. jurisdictions, which had to be given priority over foreign workers. *Id.* at 594-95.

[168] *Id.* at 602.

[169] *Id.* at 601. (emphasis added)

and well-being of its residents, and the protection of its position in the federal system.[170] The fact that the opinion in *Alfred L. Snapp* did not dedicate a single paragraph to discussing the nature of the relationships between Puerto Rico and the United States shows that already in the summer of 1982, the U.S. Supreme Court had clearly established that the nature, scope of authority and sovereignty of the Commonwealth in internal matters were equal to those of the states of the Union.[171]

Between the decisions in *Calero-Toledo* and *Examining Board, supra*, and the decisions in *Rodríguez* and *Snapp & Son, supra*, the U.S. Supreme Court issued two opinions that seemed to sow doubt on the nature of the authority and autonomy of the Commonwealth. They are the opinions issued in *Califano v. Gautier Torres*[172] and *Harris v. Rosario*.[173] In both cases it was decided

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[170] *Id.* at 607-08.

[171] *Id.* at 608. This subject was dismissed by the Court with a brief expression in footnote 15: "Although we have spoken throughout of a "State's" standing as *parens patriae*, ... the Commonwealth of Puerto Rico is similarly situated to a State in this respect: It has a claim to represent its quasi-sovereign interests in federal court at least as strong as that of any State."

[172] *Califano v. Gautier Torres*, 435 U.S. 1 (1978).

[173] *Harris v. Rosario*, 446 U.S. 651 (1980). The Majority Opinion argues that these two cases, together with *Torres v. Puerto Rico, infra*, which we will address separately, show that Puerto Rico continued to be a territory subject to the plenary powers of Congress. Maj. Op. at 50. The truth is that none of

that Congress could exclude Puerto Rico from federal legislation granting economic benefits to U.S. citizens residing in the 50 states. However, in *Califano*, the U.S. Supreme Court did not express itself on whether Puerto Rico is subject to the plenary authority of Congress through the territorial clause of the federal Constitution; it simply did not discuss the political relationship between Puerto Rico and the United States.[174] Something similar happened in *Harris*, an opinion of a mere two pages in which the U.S. Supreme Court also failed to examine the relationships between both countries. In one portion of the short opinion, the Court states that, pursuant to the territorial clause of the federal Constitution, Congress can treat Puerto Rico differently, as long as there is a "rational basis" to do so.[175] Contrary to the holding in the Opinion of the Court in the case at hand, these decisions do not lead to the conclusion that Congress has plenary power

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those three opinions says that, and in *Califano* and *Harris* the U.S. Supreme Court did not even discuss the nature of the authority and the scope of autonomy of the Commonwealth, which led to Associate Justice Marshall's dissent. *See Harris v. Rosario*, *supra*, at 652.

[174] The U.S. Supreme Court briefly refers to the fact that Puerto Rico has an "unparalleled" relationship with Puerto Rico and that the federal District Court had "apparently" recognized the capacity of Congress to treat Puerto Rico differently. *Califano*, *supra*, at 907, n.4.

[175] *Harris v. Rosario*, *supra*, at 651-52.

over Puerto Rico to legislate the internal matters of the island.[176]

These two decisions came after *Calero-Toledo and Flores de Otero*, which means that the federal Court issued them while fully aware of its holdings in said cases.[177] It is our understanding that the decisions in *Califano* and *Harris* are framed within the traditional functional posture that the U.S. Supreme Court has assumed when facing the difficult questions occasionally posed by the Commonwealth within the federal system.[178] For the reasons that

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[176] Rather, like Trías Monge points out, the scope that has been attributed to the expressions of the U.S. Supreme Court far exceed what was actually said. "Quoting the territorial clause as basis for the approval of this or that law for Puerto Rico under circumstances such as those in *Harris*, in which Congress can constitutionally limit the nature of an aid program in the case of the states, treated as a group, does not necessarily mean that Congress continues to possess the authority to fully legislate for Puerto Rico. What this means is that Congress can legislate differently for Puerto Rico... The court was not faced with the problem of whether Congress keeps its plenary power over Puerto Rico or not" Trías Monge, *El Estado Libre Asociado ante los tribunales* (*The Commonwealth before the Courts*), 64 Rev. Jur. UPR 1, 26 (1995), cited in Álvarez González, *op. cit.*, at 513. *See also* Salvador E. Casellas, *supra*, at 958-59.

[177] *Flores de Otero*, *supra*, at 596.

[178] The U.S. Supreme Court itself explained that its reasons to hold that Congress can treat Puerto Rico differently were economic in nature: "[W]e concluded [in *Califano v. Torres*] that a similar statutory classification was rationally grounded on three factors: Puerto Rican residents do not contribute to the federal treasury; the cost of treating Puerto Rico as a State

we have already discussed, we are not convinced by the attempt to establish that the statements made in those two decisions must be interpreted to mean that Puerto Rico continues to be inevitably subject to the plenary powers of Congress.[179] In any case, as we have already seen, notwithstanding the statements in *Califano* and *Harris,* the U.S. Supreme Court again reaffirmed the sovereign power of Puerto Rico in its subsequent decisions in *Rodríguez, supra,* and *Snapp & Son, supra.*[180] Lastly, as an example of how

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under the statute would be high; and greater benefits could disrupt the Puerto Rican economy." *Harris, supra,* at 652.

[179] Renowned Constitutionalist and Professor David M. Helfeld stated the following when referring to the U.S. Supreme Court's reluctance to decide whether the due process of law provided by the federal Constitution applied to Puerto Rico through the Fifth or the Fourteenth Amendment: "[i]n this area of Constitutional law the Supreme Court apparently wishes to avoid clarity and precision, preferring instead the pragmatic approach; responding to the degree of control which Puerto Rico has achieved over its internal affairs." *See* Helfeld, *How Much of the Constitution and Statutes are Applicable to the Commonwealth of Puerto Rico?*, 110 F.R.D. 452 (1986). *See also Ramírez de Ferrer v. Mari Brás, supra,* at 160. The fact that Congress can legislate regarding Puerto Rico on certain matters pursuant to the territorial clause of the federal Constitution does not mean that the Commonwealth lacks sovereign power in other matters related to its self-governance.

[180] In a more recent decision, *Puerto Rico v. Branstad,* 483 U.S. 219 (1987), the U.S. Supreme Court again used a functional analysis when deciding that Puerto Rico, as the states, could ask another state to hand in a fugitive pursuant to the extradition clause of the federal Constitution, Article IV. Sec. 2, Cl. 2. The court preferred to decide the controversy under the Extradition Act, 18 U.S.C. § 3182, which clearly

complicated the subject of sovereignty within U.S. federalism can be, in exceptional cases Congress has legislated directly for the states of the Union in matters traditionally recognized as pertaining to state sovereignty.[181] Regardless, if it were subject to

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applied to both states and territories. However, the U.S. Supreme Court stated that: "The subsequent change to Commonwealth status through legislation, did not remove from the Government of the Commonwealth any power to demand extradition which it had possessed as a Territory, for the intention of that legislation was 'to accord to Puerto Rico the degree of autonomy and independence normally associated with States of the Union." *Id.* at 229-30. (Citation omitted)

[181] That was the case with the law known as the "Voting Rights Act" of 1965, 42 U.S.C. § 1973, *et seq.*, (repealed by Public Law No. 113-234 of December 16, 2014, and turned into 52 U.S.C. § 10301). Said law established certain requirements, and even demanded that authorization be requested from the U.S. Department of Justice for certain states with a history of discrimination towards African Americans to be able to approve amendments to their electoral laws. *See* 42 U.S.C. §§ 1973b(b), 1973c(a). This congressional statute clearly intervened with the sovereignty of the states, although they are not territories of the United States and are not subject to the territorial clause of the federal Constitution. The legislation was validated by the U.S. Supreme Court in *State of South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1966). It was established that "[t]he Act suspends new voting regulations pending scrutiny by federal authorities ... This may have been an uncommon exercise of congressional power, as South Carolina contends, but the Court has recognized that exceptional conditions can justify legislative measures not otherwise appropriate." This situation was maintained for those states with a racist history until *Shelby County v. Holder*, 133 S. Ct 2612 (2013). To think that the Commonwealth would be free of these same

the plenary powers of Congress–which we reject–that would not prevent us from concluding that Puerto Rico is as much a sovereign as the tribes for purposes of the doctrine of dual sovereignty.

On the other hand, in *Torres v. Commonwealth of Puerto Rico*, the U.S. Supreme Court reversed a Puerto Rico Supreme Court decision confirming the conviction of a person under a Puerto Rico law that authorized the searching at the airport of the luggage of any traveler arriving from the United States.[182] The law was challenged pursuant to the clause against searches and seizures contained in the Fourth Amendment to the federal Constitution. As stated in the Majority Opinion, the U.S. Supreme Court used the doctrine of the insular cases to determine whether it was justified to apply this constitutional provision to the island.[183] In deciding that it applied, the Court took into account the fact that the previous organic acts enacted by Congress for the island had guaranteed individual rights equivalent to those of the Fourth Amendment to the residents of the island and that

> [a] Constitution containing the language of the Fourth Amendment, as well as additional language

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exceptional conditions would be going too far, even for the creators of the 1952 Puerto Rico Constitution.

[182] *Torres v. Commonwealth of Puerto Rico*, 442 U.S. 465, 466-67 (1979).

[183] *Id.* at 468-70.

> reflecting this Court's exegesis thereof **was adopted by the people of Puerto Rico and approved by Congress.**[184]

In keeping with the holding in *Dorr v. United States, supra*, the U.S. Supreme Court stated that the interests of the United States were not in danger in Puerto Rico and that there was no risk of injustice in applying the Fourth Amendment protection against searches and seizures directly to the island. Therefore, the decision in *Torres* leaves us in exactly the same position as *Calero-Toledo* and *Flores Otero, supra*.[185]

The Majority Opinion that gives rise to this concurrence recognizes the many times that the U.S. Supreme Court has acknowledged that Puerto Rico has a sovereignty and jurisdiction similar to that of the states over matters not ruled by the federal Constitution. However, it states that "the analysis... is not whether the entity is similar to, acts like or has certain attributes of a true sovereign. The fundamental question, according to the U.S.

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[184] *Id.* (Emphasis added)

[185] *Id.* at 471. However, true to the pragmatic posture that it had assumed since *Calero-Toledo*, the Court expressly stated that it was not necessary to decide whether the protection against searches and seizures applied to Puerto Rico by virtue of the Fourth or the Fourteenth Amendment. Had the Court expressed its view on this matter, it would have directly addressed the issue of whether Puerto Rico continued to be a mere extension of Congress or not; it preferred not to do so.

Supreme Court, is whether the two entities derive their authority from the same source of power."[186] As we have seen, this analysis has serious theoretical flaws that are not consistent with the historical reality of the United States; likewise, the analysis cannot be squared with the statements of the U.S. Supreme Court itself regarding the plenary power of Congress over the indigenous tribes that, as it said, is so broad that it could make them disappear at will, but even then, the indigenous tribes are "sovereigns" for purposes of the doctrine of dual sovereignty.[187] Even more importantly, the ultimate source of punitive power of the Commonwealth is the People of Puerto Rico.[188] For these reasons, nothing bars recognition, as the U.S. Supreme Court has done on so many other occasions, that the

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[186] *Id.* at 57.

[187] *U.S. v. Lara*, *supra*, at 202.

[188] Let us remember that our Constitution begins with the words "We, the People of Puerto Rico, in order to organize ourselves politically on a fully democratic basis ... do ordain and establish this Constitution for the Commonwealth which, in the exercise of our natural rights, we now create within our union with the United States of America." P.R. Const. pmbl., 1 P.R. Laws Ann., at 266. It was neither Congress nor the People of the United States that created the Constitution of the Commonwealth. As we have already explained, it is not our duty to decide if, from a political standpoint, this change truly signified the end of a process of self-determination for Puerto Rico. But from the point of view of the authority of the Commonwealth Constitution, and of the source from which its power emanates, it cannot be said that it was not created by and is not subordinate to the will of the People of Puerto Rico.

Commonwealth has sufficient authority to be considered a sovereign for purposes of the doctrine of dual sovereignty. The Majority Opinion errs in deciding otherwise today.

C

The Rule of the Puerto Rico Supreme Court from 1954 to the Present

The Puerto Rico Supreme Court has issued statements several times about the scope and authority of our Constitution. For example, in *Pueblo v. Figueroa,* we established that the Constitution of the Commonwealth was not a congressional statute and that this Court had the final authority to interpret its provisions.[189] Regarding the source of authority of our Constitution, then-Chief Justice Snyder stated that our Constitution rested on a basis different than a mere delegation by Congress.[190] The reason to conclude thusly is that our Constitution:

> was approved by the elected representatives of the People of Puerto Rico in a Constitutional Convention. This took place after careful consideration of each clause in commissions and debate on the floor of the Convention. Finally, the People themselves expressed their approval

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[189] *Pueblo v. Figueroa*, 77 P.R. Dec. 188, 200 (1954).

[190] *Id.* at 194.

> at the polls, [for which reason it is] impossible to believe that the Constitution—a product of local drafting and debate–is in fact a federal law.[191]

Meanwhile, in *RCA v. Gobierno de la Capital*,[192] we clarified the scope and source of authority of the Commonwealth to levy taxes. We explained that the authority and power of the Puerto Rican constitutional Government:

> were not, as before, merely delegated by Congress, but *emanated from itself and were free of a higher authority*, subject only "to the limitations of its own Constitution ... and to those obligations that the People imposed on themselves by accepting the federal relations that would exist and do exist with the

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[191] *Id.* The First Circuit confirmed these expressions in *Figueroa v. People of Puerto Rico, supra.* In his Opinion, Chief Judge Magruder said: "The answer to appellant's contention is that the constitution of the Commonwealth is not just another Organic Act of the Congress. We find no reason to impute to the Congress the perpetration of such a monumental hoax. ... This constitution is not an act of Congress, though congressional approval was necessary to launch it forth." *Figueroa v. People of Puerto Rico, supra*, at 620.

[192] *RCA v. Gobierno de la Capital*, 91 P.R. Dec. 416 (1964). Reversed on other grounds regarding the application to Puerto Rico of the commerce clause of the federal Constitution in its dormant state. *ELA v. Northwestern Selecta, infra.*

> United States pursuant to Public Law 600.[193]

These statements were repeated over and over in different decisions of this Court, including *Pueblo v. Castro García, supra*, which today the Majority of this Court has decided to overrule on erroneous grounds.[194] For this reason, in *Ramírez de Ferrer v. Mari Brás, supra*, we reiterated the validity of all of these cases and added the following:

> Furthermore ... in the early years of the 21st century ... it would be a crass legal anachronism to suppose that the minimum powers of self-governance that the Commonwealth currently enjoys do not emanate from the people themselves, but that they are a mere delegation of congressional authority. We repeat... that public authority and the governmental powers of the Commonwealth, in the scope that pertains solely to it within its relationship with the United States of America, emanate from the will of the People of Puerto Rico and can only be

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[193] *Ramírez de Ferrer v. Mari Brás, supra*, at 157, citing *RCA v. Gobierno de la Capital, supra*, at 428-29.

[194] *ELA v. Rodríguez*, 103 P.R. Dec. 636 (1975); *Santa Aponte v. Secretario del Senado*, 105 P.R. Dec. 750 (1977); *Pacheco Fraticelli v. Cintrón Antonsanti*, 122 P.R. Dec. 299 (1988); *Silvia v. Hernández Agosto*, 118 P.R. Dec. 45 (1986); *PIP v. CEE*, 120 P.R. Dec. 580 (1988).

> modified by the conscious consent of said People, expressing themselves directly at the polls.[195]

We then pointed out that the acknowledgment of the Commonwealth as an autonomous entity within the American federal system, with full and sovereign authority or jurisdiction over matters not ruled by the federal Constitution is the constitutional norm established by this Court "that prevails in the Country, regardless of the political preferences of some or others, until the current constitutional regime is altered through legitimate means.[196]

These were the grounds considered by this Court when deciding *Pueblo v. Castro García* in 1988. In that case, persons indicted for offenses related to the Puerto Rico Weapons Act requested before the Court of First Instance that the charges filed against them be dismissed. They argued that they had been processed by the federal District Court and convicted for identical offenses, for which reason the subsequent process against them in the Puerto Rican forum was a violation of the constitutional protection against double jeopardy. When reversing the dismissal issued by the trial court, we analyzed the relationship between Puerto Rico and the United States after the creation of the Commonwealth. Focusing the controversy on the acknowledgment of the Commonwealth as a sovereign entity in matters

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[195] *Ramírez de Ferrer v. Mari Brás*, *supra*, at 158.

[196] *Id.* at 160-61.

not ruled by the federal Constitution, as revealed by the cases discussed in the previous section, we concluded that:

> Puerto Rico is authorized, as if it were a state, to approve and enforce a penal code. The Commonwealth, in exercising its autonomy, has jurisdiction to apply its criminal laws to all persons who commit an offense within its territorial area.[197]

The source of that authority could not be any other than the People of Puerto Rico and its Constitution,[198] therefore, "the power of [Puerto Rico] to create and implement offenses emanates [contrary to the situation prevailing in *Shell Co., supra*] not only from Congress, but from the consent of the People and therefore, from itself, for which reason the doctrine of dual sovereignty applies to it." [199]

The rule that recognizes the full authority of the Commonwealth in its internal matters was recently

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[197] *Id.* at 754-55. (Citation omitted)

[198] "In 1952, the People of Puerto Rico came together politically under the name of the Commonwealth. ... [t]he People gathered in assembly through their elected representatives and drafted their own Constitution. Since then, the political [power] of the island emanates from the consent and will of the People of Puerto Rico. ... Puerto Rico is, then, sovereign for purposes of its internal affairs." *Id.* at 765.

[199] *Id.* at 779-81.

reaffirmed in *ELA v. Northwestern Selecta.* [200] In holding that the dormant Commerce Clause of the federal Constitution, applies to Puerto Rico and declaring the unconstitutionality of a tax law, we reaffirmed that the relationship between Puerto Rico and the United States "has been evolving and has been strengthened in different ways. The U.S. Supreme Court has stated on several occasions that Puerto Rico must be treated as if it were a state for constitutional purposes or purposes of statutory application. [201] In that respect, we cited from an opinion of the U.S. Court of Appeals for the Third Circuit to stress that:

> It is not surprising that "although Puerto Rico is not a state in the federal Union, "it ... seems to have become a State within a common and accepted meaning of the word." Consistent with this common and accepted understanding, Congress frequently uses the term "State" to

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[200] *ELA v. Northwestern Selecta*, 185 P.R. Dec. 40, 48 (2012). Said case challenged the constitutionality of a law passed by the Legislative Assembly whereby a tax was levied on locally sourced and imported beef, with which a government program would be financed to promote, improve and foster the beef industry in the Country. A U.S. importer of meat requested that the statute be declared unconstitutional pursuant to the commerce clause of the federal Constitution in its dormant state. Associate Justice Fiol Matta issued a dissenting Opinion which was joined by Chief Justice Hernández Denton.

[201] *Id.* at 67.

> refer also to Puerto Rico. ... More significantly, when Congress fails explicitly to refer to Puerto Rico, courts must nonetheless inquire whether it intended to do so. [202]

In *Northwestern Selecta*, this Court recognized that, in creating the Commonwealth, there was the intent of "granting the island a degree of autonomy and independence normally associated with the states of the Union." [203]

Today, the same Majority that held the above in *Northwestern Selecta* does an about-face and holds that Puerto Rico is but a mere territory subject to the arbitrariness of Congress. In addition to the clear doctrinal inconsistency that this represents, what is at play this time is much more than the economic interests of a private company. [204] We have absolutely no doubt that the statements in *Pueblo v. Castro García, supra*, and reiterated in *Northwestern Selecta*, are the state of law prevailing in the federal courts, including the U.S. Supreme Court and the First Circuit, regarding the authority of the Commonwealth. Therefore, for purposes of the doctrine of dual sovereignty as an exception to the

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[202] *Id.* at 67, citing *United States v. Laboy-Torres*, *supra*, at 721.

[203] *Id.* at 65.

[204] "It would not [be] the first time that a majority discriminated against itself for self-deprecatory reasons." Alvarez González, *The Great State*, *supra*, at 432.

Constitutional protection against double jeopardy, Puerto Rico enjoys a sovereignty equal to that of the states of the Union.

Nevertheless, in *Pueblo v. Castro García*, we erred in concluding that the fact of said authority was enough to forgo the constitutional guarantee against double jeopardy and apply the doctrine of dual sovereignty to Puerto Rico in order to allow for a citizen to be submitted twice to a criminal process for the same offense. [205] On the contrary, we must reject this conclusion due to its serious implications on individual peace and on the dignity of human beings which our Puerto Rican system seeks to protect with the ban against double jeopardy codified in Article 11 of our Constitution.

VI

The Doctrine of Dual Sovereignty: Criticism of Its Justification

In Part III of this concurring opinion, we discussed the weaknesses of the doctrine of dual sovereignty in a theoretical, constitutional and historical context. As we stated, in *Lanza*, and subsequently in *Abbate* and *Bartkus*, the U.S.

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[205] In said case, we accepted the erred reasoning employed by the U.S. Supreme Court in *Bartkus* and *Abbate* to justify the doctrine of dual sovereignty and we expressed that "[d]enying Puerto Rico the power to enact its criminal laws, because the federal Government or a state has won the race to the courts, would be shocking and would lead to a deprivation of its historical right and duty to maintain the peace and order in its territory." *Pueblo v. Castro García, supra*, at 782.

Supreme Court justified the doctrine of dual sovereignty using two premises. First, that the Fifth Amendment did not apply directly to the States, so it did not prevent a state from prosecuting multiple times, and it also did not prevent the federal Government from prosecuting after a state had done the same. Second, that the doctrine was necessary for the federal scheme for the distribution of power.

A

The first of these justifications was eliminated in 1969, when the U.S. Supreme Court held, in *Benton v. Maryland*, that the Fifth Amendment protection against double jeopardy applies to the states by virtue of the Fourteenth Amendment, since the protection "represents a fundamental ideal of our constitutional heritage." [206] After this decision, the dual sovereignty exception to the protection against double jeopardy turns out to be an anomaly in U.S. constitutional law.[207] It is important to point out that the U.S. Supreme Court has eliminated the dual sovereignty exception for other protections offered by the Bill of Rights of the federal Constitution: the right against self-incrimination and the protection against unreasonable searches and seizures.

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[206] *Benton v. Maryland*, 395 U.S. 784, 794 (1969).

[207] Akhil Reed Amar and Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 Col. L. Rev. 1, 2 (1995).

The Right against Self-Incrimination and the Doctrine of Dual Sovereignty

Prior to 1964, a witness's statement after a federal offer of immunity was admissible in a criminal procedure filed against him in state court and vice-versa.[208] The reasoning behind this was that the Bill of Rights was only binding on the federal Government and not on the state Governments. The Court rejected this reasoning in *Murphy v. Waterfront Commission*.[209] On that same day, the U.S. Supreme Court had held that the privilege against self-incrimination of the Fifth Amendment was binding on the states through the Fourteenth Amendment, so the Court formulated the controversy in *Murphy* as follows: "whether a jurisdiction within our federal structure can force a witness—to whom it has offered immunity under its laws—to offer testimony that could be used to convict him in another similar jurisdiction."[210]

When addressing the controversy, the U.S. Supreme Court stated that the protection against self-incrimination embodies many of the most basic values of a civilized society. It reasoned that, given

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[208] *Id.* at 11; Chiesa, *supra*, at 543.

[209] *Murphy v. Waterfront Comm. of New York Harbor*, 378 U.S. 52 (1964).

[210] *Id.* at 53. (Our translation). *Malloy v. Hogan*, 378 U.S. 1, (1964), decided the same day as *Murphy*, held that the Fifth Amendment of the federal Constitution protected the individual from testifying in state court if doing so exposed him to criminal liability under state laws.

the level of cooperation existing between federal and state authorities in the criminal sphere, forcing an individual to incriminate himself in either of the two jurisdictions would defeat the principles and public policy of the constitutional protection against self-incrimination. It is notable that the U.S. Supreme Court included the inviolability of human dignity as one of the principles that informs the protection against self-incrimination offered by the federal Constitution.[211]

As the U.S. Supreme Court pointed out, since before the U.S. Constitution, the English courts had unanimously ruled that the privilege against self-incrimination protected a witness in an English court from being forced to offer testimony that could be used against him in courts in another jurisdiction.[212] Acknowledging that its prior decisions had strayed from this rule, the U.S. Supreme Court rejected the notion that the doctrine of dual sovereignty was an exception to the constitutional right against self-incrimination.[213] It held that the protection against

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[211] *Murphy, supra,* at 55-56.

[212] The protection applied even between courts of the English system with concurrent jurisdiction, such as the Court of Chancery and the common law courts. *Id.* at 57-58 (citations omitted).

[213] *Id.* at 72. However, the Court limited its decision to jurisdictions within the United States and to the jurisdiction of the federal Government, stating that there would be no obstacle if the testimony exposes the witness to criminal liability in a foreign country. *Id.* at 56, n.5.

self-incrimination offered by the Fifth Amendment of the federal Constitution protects a federal witness against self-incrimination in state court, and protects a state witness against self-incrimination in federal court.[214]

The Protection against Searches and Seizures and Dual Sovereignty

Pursuant to the doctrine of dual sovereignty, it was justifiable to admit in state court evidence obtained by means of an illegal search and seizure performed by the federal authorities, and vice-versa, since the Fourth Amendment of the federal Constitution only applied to actions of the federal law-enforcement agencies.[215] This doctrine, known as the *silver plate doctrine*, was rejected in *Elkins v. US*, decided in 1960, one year after *Bartkus and Abbate*.[216] The U.S. Supreme Court stated that the victim does not care who violated his constitutional protection against unreasonable searches and seizures and held that the correct thing to do was to exclude the evidence in the federal suit, regardless of

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[214] *Murphy*, *supra*, at 77-78.

[215] Reed Amar, *supra*, at 11.

[216] *Elkins v. U.S.*, 364 U.S. 206 (1960). In *Wolf v. Colorado*, 338 U.S. 25 (1949), the U.S. Supreme Court had held that, although the Fourteenth Amendment prohibited unreasonable searches and seizures by state officials, it did not prevent the evidence illegally obtained by state officials from being subsequently used by federal officials in a federal prosecution, since a sovereign could not be held responsible when it was another that violated the guarantees of the Fourth Amendment.

whether the victim's constitutional right had been violated by a state or by a federal official.[217] Subsequently, the holding in *Elkins* was extended to decide that evidence obtained by federal officials in violation of the Fourth Amendment was inadmissible in a state criminal procedure.[218]

When comparing these decisions with the decisions of the U.S. Supreme Court on the doctrine of dual sovereignty and the protection against double jeopardy, Professors Akhil Reed Amar and Jonathan L. Marcus point out the following:

> Here then, is the key puzzle: Whereas *Elkins* consciously built on *Wolf's* application of Fourth Amendment principles against states to overturn the silver platter doctrine, and *Murphy* explicitly built on *Malloy's incorporation* of the Incrimination Clause to overturn *Feldman*, the Court never chose to build on *Benton's* incorporation of the Double Jeopardy Clause to overturn *Barks* and *Abbate*. The Court has never explained—or even focused on—this anomaly.[219]

This analysis leads us to conclude that it is very difficult to reconcile the holding in *Elkins* and *Murphy* with the holding in *Bartkus* and *Abbate*. It

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[217] *Elkins v. U.S.*, *supra*, at 215.

[218] *Mapp v. Ohio*, 367 U.S. 643 (1961).

[219] Reed Amar, *supra*, at 15.

is even more confusing if we consider that the protection against self-incrimination and the protection against double jeopardy emanate from the same source, the Fifth Amendment of the U.S. Constitution.

B

The second justification articulated in federal caselaw—that the doctrine of dual sovereignty is a requirement of federalism—also does not withstand a critical analysis. The U.S. Supreme Court has never addressed the historical basis of the protection against double jeopardy.[220] In fact, the first criticisms of the exception of dual sovereignty to the protection against self-incrimination highlighted how the U.S. Supreme Court, in *Lanza*, twisted the roots of the protection against double jeopardy in common law.[221]

The drafters of the federal Constitution wished for the clause against double jeopardy to include the doctrine recognized as of that time in Great

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[220] Dax Eric López, *Not Twice for the Same: How the Dual Sovereignty Doctrine is Used to Circumvent Non Bis In Idem*, 33 Vand. J. Transnat'l L. 1263, 1295 (2000), citing Susan Herman, *Double Jeopardy All Over Again: Dual Sovereignty, Rodney King, and the ACLU*, 41 UCLA L. Rev. 609, 625 (1994).

[221] J.A. C. Grant, *Successive Prosecutions by State & Nation: Common Law & British Empire Comparisons*, 4 UCLA L. Rev. 1 (1956). For a more detailed account of the history of the protection against double jeopardy, *see* Rudstein, *op. cit.*, at 1-29; and Eric López, *supra*, at 1266-71, comparing it with the development of *non bis in idem* in the civil law tradition.

Britain.[222] When the federal Constitution and its Bill of Rights were drafted, it was firmly established that the acquittal or conviction of a person in a court with competent jurisdiction prevented that that person were prosecuted again for the same offense in the English courts.[223] That is, before the protection against double jeopardy was included in the federal Constitution, the English courts had already rejected dual sovereignty as an exception to the protection against double jeopardy.[224]

That being the case, it could hardly be held that the intention of the American constituents was to include double sovereignty as an exception to the

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[222] This, although we recognize that there was not much debate regarding the meaning of the clause. Eric López, *supra*, at 1296. (Citations omitted).

[223] Reed Amar, at 6; Eric López, *supra*, at 1270. At least three cases had held that a conviction or acquittal in another jurisdiction activated the protection against double jeopardy in England. The most important case is *R. v. Hutchinson*. Hutchinson was accused of murdering a person in Portugal and was acquitted by the Portugal courts. He was later arrested in England and brought before the court, which decided, unanimously, that since he had been acquitted by the Portugal court, he could not be judged again for the same offense in England. Grant, *supra*, at 9. *See also* Rudstein, *op. cit.*, at 1-29.

[224] This state of law was so widely accepted that it was articulated in several treaties of the time, including the renowned Blackstone. Rudstein, *op. cit.* at 4.

protection against double jeopardy.[225] Especially when the foundations of the doctrine of dual sovereignty are not articulated in the federal Constitution, but were developed based on caselaw to accommodate conflicts of concurrent jurisdiction between the states of the Union and the federal Government.[226]

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[225] In fact, some of the first decisions of the U.S. Supreme Court recognized as valid the criminal decisions of foreign courts. *See* Eric López, *supra*, at 1296.

[226] Eric López, *supra*, at 1274-75 (citations omitted). In *Bartkus*, Justice Black also criticized the notion that the exception of dual sovereignty was a requirement of U.S. federalism:

> The Court, without denying the almost universal abhorrence of such double prosecutions, nevertheless justifies the practice here in the name of 'federalism'. This, it seems to me, is a misuse and desecration of the concept. Our Federal Union was conceived and created 'to establish Justice' and to 'secure the Blessings of Liberty,' not to destroy any of the bulwarks on which both freedom and justice depend. We should, therefore, be suspicious of any supposed 'requirements' of 'federalism' which result in obliterating ancient safeguards. I have been shown nothing in the history of our Union, in the writings of its Founders, or elsewhere, to indicate that individual rights deemed essential by both State and Nation were to be lost through the combined operations of the two governments.

Bartkus, *supra*, at 155-56 (Dissenting Op. of Justice Black).

But in addition to being contrary to the development of English common law, the decisions of the U.S. Supreme Court—particularly *Heath v. Alabama*—give an unjustified value to the sovereignty of the government, whether state or federal, sacrificing the interest of the individual in not being processed criminally a second time.[227] As we saw in *Lanza*, the Court articulated the doctrine of dual sovereignty without discussing the interests that inform the protection against double jeopardy of the Fifth Amendment, which are aimed at protecting the individual when facing the immense power of the State. To the contrary, the doctrine of dual sovereignty unjustifiably allows for two governments to allow, in tandem, what each of them was not able to achieve on its own: submitting a citizen to multiple prosecutions and punishments for the same offense.[228]

The dissenting opinions of Justice Black in *Abbate* and *Bartkus* clearly point out the main flaws and inconsistencies of the doctrine of dual sovereignty as an exception to the protection against double jeopardy. In *Barktus*, Justice Black stated that the majority decision weakened the constitutional protection against double jeopardy, one of the main values of the People of the United States and a fundamental value for the entire Western tradition. He also pointed out that the

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[227] Reed Amar, *supra*, at 5.

[228] *Id.* at 2.

exception of dual sovereignty did not responsibly address the purpose of the ban against double jeopardy, which is none other than protecting the individual when facing the power of the State. From the point of view of the individual, it is of little importance that he is punished by two different sovereigns instead of one. In both cases, the citizen is exposed twice to being processed or punished for the same conduct.[229]

On the other hand, in *Abbate*, Justice Black pointed out that the exception of dual sovereignty allows for two sovereigns to achieve together what neither of them was able to achieve on its own.[230] Acknowledging that most nations with legal systems based on common law consider that a conviction in another jurisdiction prevents a prosecution in their own, Black deemed it unsustainable to conclude that the states of the Union are more foreign with regards

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[229] "Looked at from the standpoint of the individual who is being prosecuted, this notion is too subtle for me to grasp. If double punishment is what is feared, it hurts no less for two 'Sovereigns' to inflict it than for one. If danger to the innocent is emphasized, the danger is surely no less when the power of State and Federal Governments is brought to bear on one man in two trials, than when one of these 'Sovereigns' proceeds alone. In each case, inescapably, a man is forced to face danger twice for the same conduct." *Bartkus*, *supra*, at 155, Dissenting Op. of Justice Black (Citations omitted).

[230] *Abbate*, *supra*, at 203 (Dissenting Op. of Justice Black).

to the federal Government than two countries that are completely disassociated from each other.[231]

The U.S. Supreme Court has tried to raise some practical justifications, on the basis of U.S. federalism, to hold that the doctrine of dual sovereignty is necessary. For example, it has reasoned that without the doctrine of dual sovereignty, a sovereign—such as a state of the Union—could legislate an insignificant penalty to prevent another sovereign from prosecuting its citizens for a greater offense.[232] According to the Court, this would undermine the criminal legislation of the second sovereign and would prevent it from being able to enforce its laws.[233] Therefore, when there is concurrent criminal jurisdiction, both sovereigns will simply compete to be the first to bring the accused before its courts.[234]

However, there are other alternatives to address the friction generated by American federalism and which is so concerning to the U.S. Supreme Court.

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[231] "It is as much an affront to human dignity and just as dangerous to human freedom for a man to be punished twice for the same offense, once by a State and once by the United States, as it would be for one of these two Governments to throw him in prison twice for the same offense." *Id.*

[232] *Lanza*, *supra*, at 80; *Abbate*, *supra*, at 195.

[233] *Abbate*, *supra*, at 195.

[234] *Lanza*, *supra*, at 385. We must not overlook the fact that *Lanza* was decided during the Prohibition, when the federal Government had many difficulties in implementing the prohibition of alcohol consumption and commerce.

For example, if there is national concern about a particular matter over which the federal Government and another sovereign share jurisdiction, such as the commission of a crime or offense that is particularly offensive or dangerous to national security, Congress can simply legislate and preempt.[235]

Another practical justification offered by the U.S. Supreme Court to uphold the doctrine of dual sovereignty is that it promotes the effective administration of justice in the federal jurisdiction. According to this posture, it would be impractical to require that federal authorities be kept abreast of the investigations performed by state authorities.[236] The same logic would apply to the States. However, given the high degree of cooperation between the federal government and state law-enforcement agencies, this justification responds to an outdated view of U.S. federalism, something that many commentators have criticized. This is especially worrisome today, considering the close collaboration between the federal Government and other sovereigns in criminal matters.[237] Puerto Rico is not the exception, since we have reached many

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[235] *See* Dissenting Op. of Justice Black in *Bartkus* and *Abbate*.

[236] *Abbate*, *supra*, at 195. Eric López, *supra*, at 1277.

[237] According to Eric López, this cooperation has reached the point where "the activities of the state and the federal law-enforcement agencies are so tightly intertwined that they cannot be considered separate and independent agencies." Eric López, *supra*, at 1299.

collaboration agreements with the federal authorities in several areas.

C

The Doctrine of Dual Sovereignty and the States

To properly address the undesirable consequences of the doctrine of dual sovereignty, some states have enacted legislation prohibiting its application.[238] Others have drafted their bill or rights to expressly include in the clause against double jeopardy the protection of the individual who has been prosecuted for the same offense in another jurisdiction.[239]

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[238] Several states have incorporated, through statutes, rules similar to Rule 1.10 of the Model Penal Code, which would considerably limit the authority of a jurisdiction to prosecute a citizen for conduct that also constitutes an offense in another jurisdiction. Most prohibit the initiation of a second criminal process for an offense that has already been punished in another jurisdiction, except if the offense in question seeks a different state interest that was not satisfied in the first prosecution in the other jurisdiction. The comments to the proposed Rule recognize the inconsistency between the decisions of the U.S. Supreme Court availing the exception of dual sovereignty in the context of the protection against double jeopardy and their decisions declaring the exception inapplicable regarding the protection against self-incrimination, despite the similarities of the principles to which each protection responds. *Model Penal Code and Commentaries*, Sec. 1.10, at 169.

[239] For example, the Montana Constitution expressly extends the protection against double jeopardy to proceedings in any jurisdiction. Mont. Const. Art. II, Sec. 25.

Even without expressly rejecting the doctrine of dual sovereignty, some of the states of the Union have interpreted their constitutional clause against double jeopardy in keeping with the principles that shape the Fifth Amendment, and have given the appropriate weight to the interests of the individual vis-a-vis the sovereign. For example, in 1971, the Pennsylvania Supreme Court expressed itself against a second prosecution and punishment in Pennsylvania after a punishment in another jurisdiction, except under certain circumstances.[240] The Pennsylvania Supreme Court criticized the reasoning of the U.S. Supreme Court in *Barktus, supra*, and pointed out that in said case, the majority did not contemplate the possibility that both sovereigns seek the same interests by prosecuting the individual. Even more importantly, it states that the interest of the citizen versus the possible interests of the sovereign were also not examined:

> When one examines the 'dual sovereignty' doctrine as it applies to the double jeopardy clause, we are really involved in a balancing process, whereby we place the interests of the two sovereigns on one side of the judicial scale, and on the other side we place the interest of the individual to be free from twice

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[240] *Comm. v. Mills*, 447 Pa. 163, 169 (1971). Pennsylvania eventually incorporated in its system, through legislation, Rule 1.10 of the Model Penal Code and the holding of its Supreme Court.

> being prosecuted and punished for the same offense. The basic problem with *Bartkus* is that the majority first failed to recognize the interests of the two sovereigns might be the same, but more important they secondly failed to really examine the interest of the individual.
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> .....
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> The striking feature [of the double jeopardy clause's] general rules and policies is that the focus is always on the individual, on a person's basic and fundamental rights. This feature is the common thread that runs across all of the provisions of the Bill of Rights, and we believe this is the element the Supreme Court failed to adequately consider in *Bartkus*.
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> .....
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> We are talking about the two governments protecting their interests, when we really should be talking about the individual, since by focusing on the individual we see that it matters little where he is confined—in a federal or state prison—the fact is that his liberty is taken away twice for the same offense.[241]

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[241] *Id.* The New Hampshire Supreme Court held in 1978 that the State of New Hampshire was prevented from

VII

Human Dignity and the Protection against Double Jeopardy

As we stated in *ELA v. Hermandad de Empleados,* the delegates to the Constitutional Assembly wanted to create a broader Bill of Rights that incorporated the thoughts of different cultures and the contemporary developments on new categories of rights. Consequently, the courts are bound to liberally interpret the rights consecrated therein.[242]

The Bill of Rights of our Constitution begins by affirming that "the dignity of the human being is

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prosecuting a defendant that had been acquitted in federal court for the same facts. By doing so, the Court emphasized the need to consider the interest of the individual instead of the interests of the sovereign:

> "Looking at the matter from that standpoint, we cannot escape the conclusion that the individual citizen is as much endangered by a second prosecution by the same sovereign after an acquittal as he would be by such a second prosecution by a different sovereign under our federal system."

State v. Hogg, 118 N.H. 262, 267 (1978). It also reasoned that, because its Constitution was drafted prior to the federal Constitution, it should follow the doctrine firmly established in English common law.

[242] P.R. Const., Art. II § 19. "The foregoing list of rights shall not be understood as a limitation and it does not entail the exclusion of other rights belonging to the People in a democracy and not specifically mentioned."

inviolable."[243] Inspired by the Universal Declaration of Human Rights and the American Declaration of the Rights and Duties of Man, our constituents inserted Puerto Rico in the modern constitutional currents that arose in response to the horrors of the Second World War.[244] By enunciating the inviolability of the dignity of the human being as its starting point, our Bill of Rights does not do so as if it were merely an additional right to all the rest. The dignity of the human being is established as an independent right, demandable in and of itself, and at the same time, as a principle to which all of the other fundamental rights protected by our legal system answer:

> We must remember that [the inviolability of human dignity] is contained in a Bill of Rights, in a list that precedes the articles corresponding to the structure of the government. This Bill of Rights does not appear as an amendment to the Constitution. From its own terms, it is named as a right; in other words, it is not

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[243] P.R. Const., Art. II § 1.

[244] *López Vives v. Policía de P.R.*, 118 P.R. Dec. 219, 226-27; Carlos E. Ramos González, *La inviolabilidad de la dignidad humana: lo indigno de la búsqueda de expectativas razonables de intimidad en el derecho constitucional puertorriqueño* (*The Inviolability of Human Dignity: The Appalling in the Search for Reasonable Expectation of Privacy in Puerto Rican Constitutional Law*), 10 Academia Puertorriqueña de Jurisprudencia y Legislación 1, 1-2 (2010).

> articulated as a value or principle. It is expressed in absolute terms. It does not allow exceptions. It is not possible for a temporary violation of same to be tolerated. It does not allow higher values. Not only is it aimed at the State solely limiting the exercise of its powers; it is also aimed at society: nobody can violate human dignity.[245]

The Bill of Rights of the Constitution of the United States, which also inspired our Bill of Rights, has the main purpose of limiting the powers of the State against the individual. However, our Bill of Rights not only limits the powers of the State to protect the individual, but it also imposes on the State the obligation to vindicate the rights that it recognizes, since human dignity so demands. The main principle of our Bill of Rights, our Constitution and our legal system is, therefore, the protection of human dignity.

It is not easy to define a concept such as human dignity because its intrinsic meaning is significantly conditioned by cultural factors.[246] Although it is also the main criticism raised against it, it is precisely in the apparently inherent ambiguity of the concept of human dignity where its immense normative

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[245] Carlos Ramos, *supra*, at 5.

[246] Oscar Schachter, *Human Dignity as a Normative Concept*, 77 The Am. J. of Int. L. 848, 849 (1983).

potential resides.[247] It is we, constituted in the Puerto Rican society, who must provide it with concrete content according to the principles that we value and cherish as a people. This Supreme Court is only one of the many entities that exercise the sovereign power of the People of Puerto Rico and share the responsibility of defining the specific content of human dignity in our society. As Jaime Benítez stated in our Constitutional Assembly:

> I now would like to briefly point out the ideological architecture within which [the proposition of the Bill of Rights Commission] is mounted. Perhaps all of it is summarized in the first sentence of its first postulate: *the dignity of the human being is inviolable.* This is the cornerstone of democracy. In it lies its profound moral strength and vitality. Because before anything else,

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[247] Some hold that human dignity is an empty legal concept, subject to significant judicial manipulation. Matthias Mahlman, *The Basic Law at 6-Human Dignity and the Culture of Republicanism*, 11 German L. J. 9, 10, 12 (2010) (citations omitted). As Professor Alvarez González correctly points out, "[t]he fact that the concept of dignity is hard to define and apply should not signify that we should refuse to attempt it and banish this constitutional provision," particularly if we consider its primacy in our legal system and the constitutional imperative to provide it content. José J. Álvarez González, *Contestación al discurso del profesor Carlos E. Ramos González (Answer to Statement by Prof. Carlos E. Ramos González)*, 10 Academia Puertorriqueña de Jurisprudencia y Legislación 31, 39 (2010).

> democracy is a moral force and its morals lie precisely in its acknowledgement of the dignity of the human being, of the high regard warranted by said dignity and the consequent responsibility of the entire constitutional order to rely on it, protect it and defend it.[248]

Articulating human dignity as the guiding principle of our Bill of Rights is unparalleled among the international declarations of human rights that inspired it, or in the federal Constitution or the constitution of any of the states.[249] However, there are other systems that place the dignity of the human being in a similar position to ours; for example, that of the Federal Republic of Germany That is why it is useful to resort to the caselaw of the German Federal Constitutional Court to clarify the implications of declaring that human dignity is the cornerstone of our system.[250]

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[248] 2 *Diario de sesiones de la Convención Constituyente de Puerto Rico*, 1103 (1961) (Emphasis in original).

[249] Carlos Ramos, *supra*, at 7. Although the State of Montana, whose constitution was inspired by ours, includes the inviolability of the dignity of the human being in its bill of rights, it does not hold the same exalted place that our Constitution gives to it. *See* Vicki C. Jackson, *Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse*, 65 Mont. L. Rev. 15 (2004).

[250] *Arroyo v. Ratan*, *supra*, at 60; *Figueroa Ferrer v. ELA*, *supra*, at 250.

As in our Constitution, in the German Constitution the inviolability of the human being is the cardinal principle from which its other basic rights are derived.[251] The Federal Constitutional Court has expressed that the inviolability of the human being is the most essential characteristic of its Constitution.[252] It has even gone so far as to give it normative meaning, assigning it concrete legal consequences. For example, based on the inviolability of human dignity, the caselaw of the German Constitutional Court has developed a ban on using the human being as an instrument, as well as the obligation to respect the autonomy of the human being over his personal and social life, and to respect his/her humanity.[253] Specifically, the German Federal Constitutional Court has ruled that a life sentence without the possibility of release violates the dignity of the individual, not because it uses him as an instrument, but because it fails to respect his humanity by not recognizing the possibility that the

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[251] For a comparison between the way in which the German system and the Puerto Rican system have addressed the inviolability of the dignity of the human being, *see* Luis A. Avilés, *Human Dignity, Privacy and Personal Rights in the Constitutional Jurisprudence of Germany, the United States and the Commonwealth of Puerto Rico*, 67 Rev. Jur. UPR 343, 346 (1998).

[252] Mahlmann, *supra*, at 10.

[253] *Id.* at 24.

human being, as an autonomous subject, may modify his behavior and return to society.[254] Therefore:

> The guiding principle that German caselaw has derived from its dignity clause is that the human being is an end in and of itself and can never become an object of the power of the State. Based on that central concept, German caselaw has derived concrete consequences, both substantive and procedural.[255]

During the debates that developed in our Constitutional Assembly regarding the Bill of Rights of our Constitution, the Report of the Bill of Rights Commission stated that including the inviolability of the dignity of the human being as the first right of the Bill had the purpose of establishing it as the cardinal principle that informed all the other rights, and, therefore, our legal system. It also states that the Puerto Rican legal system, including this Court, is bound to expand the provisions of our Bill of Rights in order to adapt them to the needs of Puerto Rican society.[256] In other words, the so-called

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[254] *Id.* at 27. For a more detailed discussion, *see* Aviles, *supra*, at 352-53.

[255] Álvarez González, *Contestación*, *supra*, at 40. Professor Alvarez also points out that this caselaw conflicts with ours in certain areas, such as freedom of speech, which is given lesser protection there.

[256] 4 *Diario de Sesiones de la Convención Constituyente de Puerto Rico*, 2561 (1961).

"broader scope" of our Constitution not only occurs based on the liberal interpretation demanded by section 19 of the Bill of Rights, but is an imperative resulting from the inviolability of the dignity of the human being. Precisely because it informs the other fundamental rights and permeates all of our legal system, the dignity of the human being demands giving greater effectiveness to the principles that the People of Puerto Rico consecrated in the Bill of Rights.

Conceiving human rights as derived from true human dignity gives this Court authority to formulate new rights and expand the existing rights and adapt them to the new contexts of our society.[257] That is the legal and political logic that gives rise to the broader scope of our Bill of Rights.

In keeping with this reality, we have recognized that human dignity informs the rights included in the Bill of Rights; among them the right to intimacy, the protection against unreasonable searches and seizures, and the ban on wiretapping.[258] For example, we have stated that the right to intimacy and the right to work are consubstantial with human dignity.[259] We have also expanded the existing

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[257] Schachter, *supra*, at 853.

[258] P.R. Const., Art. II § 8; P.R. Const., Art. II § 10.

[259] *Arroyo v. Rattan*, *supra*, at 61.

rights, referring to human dignity, to address new contexts and create new rights.[260]

However, few of our opinions address the inviolability of the dignity of the human being independently and carefully, and we have never articulated human dignity as an independent right.[261]

VIII

Because of its own nature, the doctrine of dual sovereignty defeats the basic principles of the protection against double jeopardy. As we have already discussed, although firmly established in the caselaw of the U.S. Supreme Court, several considerations undermine its legitimacy. The doctrine of dual sovereignty is not consistent with the historical background of the protection against double jeopardy in England. It is also not consistent with the theoretical principle of the sovereignty of the People of the United States over the federal Government and over that of the states of the Union,

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[260] In *Arroyo v. Rattan*, *supra*, we held that the protection of intimacy protects the employee that refuses to submit himself to a polygraph test. In *Figueroa Ferrer*, we held that, pursuant to the right to intimacy and to dignity in our legal system, the grounds for divorce based on mutual consent or divorce without fault. [sic]

[261] *See* Carlos Ramos, *supra*, at 10; Álvarez González, *Contestación*, *supra*, at 36-37; Hiram Meléndez Juarbe, *La Constitución en ceros y unos: un acercamiento digital al derecho a la intimidad y la seguridad pública*, 77 Rev. Jur. UPR 45 (2008); Avilés, *supra*.

or with the historical processes of the admission of new states into the Union. Several states have decreed its invalidity, whether through constitutional interpretation or statutorily. Additionally, the U.S. Supreme Court itself has refused to apply the doctrine of dual sovereignty to other basic rights of the Bill of Rights of the federal Constitution—including other Fifth Amendment rights—and the concerns regarding federalism can be addressed in other ways. Therefore, none of the grounds that the U.S. Supreme Court has articulated moves us to uphold the doctrine of dual sovereignty in our legal system.

Even more importantly, the doctrine of dual sovereignty does not even attempt to balance the interest of the sovereign in punishing an offense and the right of the individual to not be punished or prosecuted several times for the same offense. This is a direct attack on the dignity of the human being, using him as a mere instrument of the punitive interest of the State.

Our analysis confirms without question that the Commonwealth of Puerto Rico is a sovereign for purposes of the constitutional protection against double jeopardy and the doctrine of dual sovereignty. However, it also confirms that the inviolability of the dignity of the human being is the cardinal principle that informs our entire legal system. Double exposure to a penal process based on dual sovereignty is incompatible with this constitutional reality. Thus, in order to be faithful to the aspirations and values that the People of Puerto Rico

expressed in their Constitution, we must eliminate the doctrine of dual sovereignty from our legal system.

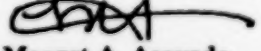
For the reasons stated above, I would partially overrule the holding by this Court in *People v. Castro García* and would hold that the constitutional protection against double jeopardy expressed in the Puerto Rico Constitution bars the Commonwealth from prosecuting an individual for the same offense already punished by another sovereign. Therefore, although for different reasons, I concur with the result of the Majority opinion and I would modify the judgment of the Court of Appeals to dismiss all of the indictments against Mr. Sánchez Valle and Mr. Gómez Vázquez under Art. 5.01 of the Weapons Act.

[signed]
Liana Fiol Matta
Chief Justice

CERTIFICATE OF TRANSLATION INTO ENGLISH

I, Margot A. Acevedo, of legal age, married, a resident of Shorewood, WI., a professional interpreter/ translator, certified by the Administrative Office of the United States Courts, do HEREBY CERTIFY that I have personally translated the foregoing document and that it is a true and accurate translation to the best of my knowledge and abilities.

In San Juan, Puerto Rico, today, July 1, 2015.



Margot A. Acevedo
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[CERTIFIED TRANSLATION]

IN THE SUPREME COURT OF PUERTO RICO

The People of Puerto Rico
Respondent
v.
Luis M. Sánchez Valle
Petitioner

The People of Puerto Rico
Respondent
v.
Jaime Gómez Vázquez
Petitioner

The People of Puerto Rico
v.
René Rivero Betancourt

The People of Puerto Rico
v.
Rafael A. Delgado Rodríguez

CC-2013-0068
CC-2013-0072

"[A] constitutional State is precisely based on the regulatory proclamation

> that there is a sovereign and that this sovereign is the people."[1]
>
> "Whether God alone is sovereign, that is, the one who acts as his acknowledged representative on earth, or the emperor, or prince, or the people, meaning those who identify themselves directly with the people, the question is always aimed at the subject of sovereignty, at the application of the concept to a concrete situation."[2]

Dissenting Opinion issued by Associate Justice Rodríguez Rodríguez

San Juan, Puerto Rico, on March 20, 2015.

Once again, a majority of this Court hastens to overrule, on questionable grounds, firmly-established precedents of our legal system.[3] In this manner

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[1] Manuel Aragón, *Constitución, democracia y control* [*Constitution, Democracy and Control*] 15 (2002), available at http://biblio.juridicas.unam.mx/libros/1/288/4.pdf

[2] Carl Schmitt, *Political Theology. Four Chapters on the Concept of Sovereignty* 10 (George Schwab trans., 2005).

[3] *See, e.g.*, *Rivera Schatz v. Estado Libre Asociado de Puerto Rico*, 2014 T.S.P.R. 122, 191 P.R. Dec. ___ (2014) (revoking *Col. de Abogados de P.R. v. Schneider*, 112 P.R. Dec. 540 (1982)); *E.L.A. v. Northwestern Selecta*, 185 P.R. Dec. 40 (2012) (revoking *R.C.A. v. Gobierno de la Capital*, 91 P.R. Dec. 416 (1964)); *Roselló Puig v. Rodríguez Cruz*, 183 P.R. Dec. 81 (2011) (partially revoking *Toppel v. Toppel*, 114 P.R. Dec. 775 (1983)); *E.L.A. v. Crespo Torres*, 180 P.R. Dec. 776 (2011) (revoking,

concepts that are at the very core of the legitimacy of our political system and the Rule of Law that prevails in our jurisdiction are unexpectedly disturbed.

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among others, *Sepúlveda v. Depto. de Salud*, 145 P.R. Dec. 560 (1998); *Aulet v. Depto. Servicios Sociales*, 129 P.R. Dec. 1 (1991); *A.C.A.A. v. Bird Piñero*, 115 P.R. Dec. 463 (1984); *Cartagena v. E.L.A.*, 116 P.R. Dec. 254 (1985); *American R.R. Co. of P.R. v. Wolkers*, 22 P.R. Dec. 283 (1915); *Arandes v. Báez*, 20 P.R. Dec. 388 (1914)). It is worth pointing out that either intentionally or incidentally, at least three of the four aforementioned cases revoked precedents that were established during the time that this Court was presided by our most renowned jurist, Mr. Jose Trías Monge. *See Schneider*, 112 P.R. Dec. 540; *Toppel*, 180 P.R. Dec. 775; *Cartagena*, 116 P.R. Dec. 254. There is no doubt that Mr. Jose Trías Monge, who presided this Court from April 19, 1974, to September 30 1985, has been our most distinguished jurist. Evidence of this, for example, are his valuable contributions to our legal and intellectual heritage. In addition, it was the Trías Court that systematically broadened the enjoyment of civil and fundamental rights in our Country. *See, e.g., Ortiz Angleró v. Barreto Pérez*, 110 P.R. Dec. 84 (1980); *Figueroa Ferrer v. E.L.A.*, 107 P.R. Dec. 250 (1978); *E.L.A. v. Hermandad de Empleados*, 104 P.R. Dec. 436 (1975). We also owe that court, to mention only one of so many contributions, the development of our "broader bill." *See* Ernesto L. Chiesa, *Los derechos de los acusados y la factura más ancha* [*The Rights of the Accused and the Broader Scope*]. Speech made at his induction into the Puerto Rico Jurisprudence and Legislation Academy on February 9, 1995, 5 P.R. Juris. & L. Acad. Rev. 61 (1998); Ernesto L. Chiesa, *Los derechos de los acusados y la factura más ancha*, 65 U.P.R. L. Rev. 83 (1996). *See also* Carmelo Delgado Cintron, *José Trías Monge: Las dimensiones del saber y del poder* [*José Trías Monge: The Dimensions of Knowledge and Power*], 73 U.P.R. L. Rev. 185 (2004).

Thus, I vigorously dissent from the opinion adopted by a majority of this Court setting aside the rule established in *Pueblo v. Castro García*, 120 P.R. Dec. 740 (1988), which recognized the Commonwealth of Puerto Rico (the Commonwealth) as a sovereign pursuant to the dual sovereignty doctrine for purposes of the constitutional protection against double jeopardy.

Even more significant is the fact that the majority thereby unjustifiably deprives the State of a valuable tool for its fight against crime. According to the majority's "reasoning," the Commonwealth is barred from indicting persons who are prosecuted at the federal level. In other words, corruption cases such as the ones that occurred during Victor Fajardo's tenure as Secretary of Education in the nineties could not have been filed in our local courts, as was done in the past. More recently, thanks to this decision, the Commonwealth will be unable to file bribery charges under Puerto Rico laws against the convict Lutgardo Acevedo, even if it is deemed appropriate. The inevitable outcome is that violations of our Puerto Rico laws will remain unpunished as a result of what has been the most serious stains on our Country's Judiciary. Ironically, it is the Judiciary itself, speaking through a majority of this Court, who endorses such impunity.

Furthermore, today's unfortunate decision, based more on ideology than on law, could very well have a negative impact on the collaborative agreements between agencies of the government of the United States and Puerto Rico. This, because prosecution at

the federal level will mean that violations of Puerto Rican laws cannot be prosecuted. In the end, such violations will be "free."[4] Moreover, I anticipate that sooner rather than later there will be a downpour of *habeas corpus* petitions pending before the courts of our Country. It appears that the majority does not care much about these detrimental and harmful effects on the administration of justice in our country, because they issued their decision very well knowing what is going to happen. Let me repeat again, I dissent.

Lastly, this ill-fated ruling once again turns this Court's back to the United States Constitution and the rules set by the Highest Court of the United States with regard to the scope and contents of the that Constitution.

The majority's decision is incompatible with *U.S. v. Wheeler*, 435 U.S. 313 (1978). Furthermore, it departs from, and even contradicts, the opinions of said Court in *Calero-Toledo v. Pearson Yacht Leasing*

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[4] The answer that the majority offers to this eventuality is little less than simplistic. It also demonstrates a vast lack of knowledge regarding collaboration agreements between the Puerto Rico Department of Justice and officials of the United States Department of Justice who work in Puerto Rico and how they operate and have operated. Lastly, it demonstrates clear and unfortunate disregard for the interest of any State or duly constituted political entity to enforce its own laws, as well as for the work that our local Department of Justice and prosecutors do every day. Instead, their work should be respected and acknowledged, not disregarded.

Co., 416 U.S. 663 (1974); *Examining Bd. of Engineers v. Flores de Otero*, 426 U.S. 572 (1976); *Rodríguez v. Popular Democratic Party*, 457 U.S. 1 (1982), and *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986). That should be enough for the United States Supreme Court to intervene in this case to bring the majority of this Court back to the fold of the United Sates Constitution.

I

Since the application of the dual sovereignty doctrine, as a threshold question, does not require a detailed account of the facts of the case, I will limit myself to what is indispensable.

A

On September 28, 2008, Mr. Luis M. Sánchez del Valle was charged with violations of Article 5.01 of the Puerto Rico Weapons Act, 25 L.P.R.A. § 458, for allegedly selling firearms without a permit. In addition, he was charged with a subsequent violation of the same article for selling ammunition without a permit. Lastly, he was charged with a violation of Article 5.04 of said criminal statute, which establishes that it is a felony to carry a firearm illegally. 25 L.P.R.A. § 458c.

Before the criminal proceedings against Mr. Sánchez del Valle in state court concluded, he was indicted by a federal Grand Jury for violations of federal criminal laws that prohibit the illegal traffic of firearms and ammunition through interstate commerce. 18 U.S.C. §§ 922(a)(1)(A), 923(a),

924(a)(1)(D) and 924(2). In due course, the United States District Court for the District of Puerto Rico found Mr. Sánchez del Valle guilty of the charges brought against him and sentenced him to five months in prison, five months of home arrest and three years of supervised release.[5]

Consequently, Mr. Sánchez del Valle filed with the Court of First Instance a motion to dismiss under Rule 64(e) of the Rules of Criminal Procedure, 34 L.P.R.A. App. II, R. 64(e), essentially claiming protection under the double jeopardy clause set forth in the United States Constitution, U.S. Const. 5th Amend., and in the Commonwealth of Puerto Rico Constitution, P.R. Constitution Art II, Section 11. He thus argued that the dual sovereignty doctrine recognized by this Court in *Pueblo v. Castro García*, should not apply because Puerto Rico continued to be a *territory* for purposes of the doctrine. For its part, the prosecution opposed the motion, arguing that the

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[5] As relevant hereto, it is worth noting that in Puerto Rico, those same felonies are subject to significantly greater sentences. *See* 25 P.R Laws Ann. § 458 ("Any violation of this section shall constitute a felony and shall be subject to a fixed, fifteen (15) year prison sentence, without the right to a suspended sentence, parole, or the benefits of any diversion program, good time credits or any alternative to the prison sentence laid down in this jurisdiction, and the convict shall serve in natural years the entire sentence imposed. In the event of aggravating circumstances, the fixed sentence established may be increased up to a maximum of twenty-five (25) years; and in the event of mitigating circumstances, it may be reduced to a minimum of ten (10) years.").

Commonwealth and the government of the United States (U.S.A.) derive their *ius puniendi*, that is, their authority to punish crimes, from different sources.

After considering the motion to dismiss, the lower court ruled in favor of the petitioner, Mr. Sánchez del Valle. It essentially determined that the Commonwealth and the United States are not different jurisdictions for purposes of the dual sovereignty doctrine. Therefore, the petitioner could not be prosecuted again in state court for the same crimes for which he was convicted in federal court,[6] because they constitute the *same offense* for purposes of the constitutional protection against double jeopardy. The prosecution appealed the decision to the intermediate appellate court.

B

On September 28, 2008, for acts related to the case discussed above, Mr. Jaime Gómez Vázquez was charged with violating Article 5.01 of the Puerto Rico Weapons Act, 25 L.P.R.A. § 458, which prohibits the illegal sale and transfer of a firearm. In addition, he 5.07, 25 L.P.R.A. § 458f, which prohibits carrying rifles, and 5.10, 25 L.P.R.A. § 458i, which prohibits transferring a mutilated firearm.

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[6] It is worth pointing out that Mr. Sánchez del Valle was not federally charged of any crime pertaining to illegally carrying firearms.

Moreover, also before the criminal proceedings in state court concluded, Mr. Gómez, as relevant here, was indicted by a federal grand jury for allegedly selling weapons illegally through interstate commerce, in relation to the same acts. 18 U.S.C. §§ 922(a)(1)(A), 923(a) and 924(a)(1)(D).[7] After several procedural events, Mr. Gómez Vázquez entered into a plea bargain in federal court. Then, on June 26, 2010, the federal court proceeded to sentence him to eighteen months in prison and three years on parole.

As a result, Mr. Gómez Vázquez proceeded to file with the Court of First Instance a motion to dismiss under Rule 64(e) of the Rules of Criminal Procedure, 34 P.R. Laws Ann. App. II, R. 64(e). In his motion, he essentially claimed the same as Mr. Sánchez del Valle, namely, that his prosecution in state court, having been convicted for *the same offenses* in federal court, violated the constitutional protection against double jeopardy laid down in the United States Constitution, U.S. Const. 5th Amend., and the Constitution of the Commonwealth, P.R. Const. Art. II § 11.

Consequently, he argued that Puerto Rico and the United States could not be considered different

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[7] As in the case of Mr. Sánchez del Valle, Mr. Gómez Vázquez was not charged with allegedly illegally carrying or mutilating firearms. Likewise, the sentence for such crimes in our jurisdiction is significantly greater. *See* 25 P.R. Laws Ann. § 458.

sovereigns and that the dual sovereignty doctrine was not applicable. The Prosecution opposed this and defended the Court's decision in *Pueblo v. Castro García*. That is, it argued that the Commonwealth is a sovereign entity separate from the U.S.A. for purposes of the constitutional protection against double jeopardy and that, therefore, the dual sovereignty doctrine does apply.

The lower court then proceeded to dismiss and, consequently, held that, indeed, Puerto Rico and the United States must be considered a sole sovereign for purposes of the protection against double jeopardy. The Prosecution filed an appeal with the intermediate court of appeals.

C

The Court of Appeals consolidated the appeals filed by the Prosecution in both cases. After examining the merits of the cases, it proceeded to set aside the appealed decisions, finding that in accordance with this Court's decision in *Pueblo v. Castro García*, the dual sovereignty doctrine does apply.

Petitioners separately appealed the intermediate court of appeals' decision. This Court, on its part, consolidated both appeals and today has set aside the rule it had endorsed in *Pueblo v. Castro García* regarding the Commonwealth's situation within the complex constitutional framework of the United States.

II

Among the various protections laid down in the Bill of Rights of our Constitution is the protection against double jeopardy, which provides that "[n]o person shall be twice put in jeopardy of punishment for the same offense." P.R. Const. Art. II § 11; *see Pueblo v. Santiago Pérez*, 160 P.R. Dec. 618 (2003). Likewise, the U.S. Constitution lays down a similar protection in its Fifth Amendment: "No person shall ... be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. 5th Amend. *See Benton v. Maryland*, 395 U.S. 784 (1969) (overruling *Palko v. Connecticut*, 302 U.S. 319 (1937)) (where it was held that the protection against double jeopardy applies to the states by virtue of the Fourteenth Amendment). In fact, our constitutional protection was formulated in accordance with its federal counterpart to incorporate its legal meaning, devised through numerous opinions of the U.S. Supreme Court[8] was deemed incorporated in ours. *See Diario de Sesiones de la Convención Constituyente de Puerto Rico* [*Legislative Record of the Puerto Rico*

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[8] *See, e.g., U.S. v. Dixon*, 509 U.S. 688 (1993) (overruling *Grady v. Corbin*, 495 U.S. 508 (1990)); *Illinois v. Vitale*, 447 U.S. 410 (1980); *Harris v. Oklahoma*, 433 U.S. 682 (1977); *Brown v. Ohio*, 432 U.S. 161 (1977); *Benton*, 395 U.S. 784; *Green v. U.S.*, 355 U.S. 184 (1957); *Blockburger v. U.S.*, 284 U.S. 299 (1932); *Gavieres v. U.S.*, 220 U.S. 338 (1911); *Vilas v. City of Manila*, 220 U.S. 345 (1911); *Grafton v. U.S.*, 206 U.S. 333 (1907); *Kepner v. U.S.*, 195 U.S. 100 (1904); *Ex parte Nielsen*, 131 U.S. 176, 187 (1889) (citing *Morey v. Com.*, 108 Mass. 433 (1871)).

Constitutional Convention] 2568-69, T. IV (1961). Thus, "[t]here is no basis to hold that the clause was given or should be given greater content" in the Puerto Rican constitutional order. Ernesto L. Chiesa Aponte, *Doble Exposición* [*Double Jeopardy*], 59 U.P.R. L. Rev. 479, 480 (1990). In addition, after *Benton,* it is undeniable that the federal constitutional doctrine pertaining to the clause is the very minimum applicable to Puerto Rico.

In short, in order to invoke such protection, it is imperative that a criminal action is invoked and the jeopardy must be related to one *same offense*. *Santiago Pérez*, 160 P.R. Dec. at 628-29. Moreover, the scope of the protection, as interpreted by the courts of justice, is not only about preventing multiple punishments. That is,

> [t]he constitutional guarantee against double jeopardy protects citizens in four instances, namely: (i) from being retried after being *acquitted* for the same offense; (ii) from being retried after being *convicted* for the same offense; (iii) from being retried for the same offense (after trial was started and did not conclude either in an acquittal nor in a conviction); and (iv) from *multiple punishments* for the same offense.
>
> *Id.* at 628 (citing *Pueblo v. Martínez Torres*, 126 P.R. Dec. 561, 568-569 (1990); *Ohio v. Johnson*, 467 U.S. 493, 498 (1984); *Brown v. Ohio*, 432 U.S.

161, 165 (1977); *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969); *Wade v. Hunter*, 336 U.S. 684 (1949)).

In addition, as we will see below, pursuant to the dual sovereignty doctrine, it is presumed that the protection will be invoked before one same sovereign.

III

The dual sovereignty doctrine,[9] to a certain extent, is a logical consequence of the United States federal system, under which states have residual sovereignty, protected by virtue of the Tenth Amendment, U.S. Const., 10th Amend. and the Eleventh Amendment, U.S. Const., 11th Amend. This doctrine was devised gradually throughout the nineteenth century in cases such as *Fox v. Ohio*, 46 U.S. 410 (1847);[10] *U.S. v. Marigold*, 50 U.S. 560 (1850),[11] and *Moore v. People of State of Illinois*, 55

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[9] For a brief account on the development of the dual sovereignty doctrine, *see* Ernesto L. Chiesa Aponte, *supra*, at 540-45.

[10] *See Fox*, 46 U.S. at 434 ("The punishment of a cheat or a misdemeanor practiced within the State, and against those whom she is bound to protect, is peculiarly and appropriately within her functions and duties, and it is difficult to imagine an interference with those duties and functions which would be regular of justifiable.").

[11] *See Marigold*, 50 U.S. at 569-70 ("With the view of avoiding conflict between the State and Federal jurisdictions, this court in the case *Fox v. The State of Ohio* have taken care to point out, that the same act might, as to its character and

U.S. 13 (1852).[12] *See also Cross v. State of North Carolina*, 132 U.S. 131, 139-40 (1889). However, it was not until *U.S. v. Lanza*, 260 U.S. 377 (1922), when the dual sovereignty doctrine was outright recognized as an exception to the constitutional protection against double jeopardy.[13] *See generally* William J. Bach, *Modern Constitutional Law* 507-09 (3d ed. 2011).

In *Lanza*, the defendants claimed that two punishments for the same criminal offense, one under the *National Prohibition Act* and another under state statutes, contravened the protection against double jeopardy laid down in the Fifth Amendment of the U.S. Constitution. *Lanza*, 260 U.S. at 379. In this case, by the time the defendants were prosecuted in federal court, they had already

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tendencies, and the consequences it involved, constitute an offence against both the State and Federal governments, and might draw to its commission the penalties denounced by either, as appropriate to its character in reference to each. We think this distinction sound...").

[12] *See Moore*, [55] U.S. at 20 ("[T]his court has decided, in the case of *Fox v. The State of Ohio*, (5 How. 432,) that a State may punish the offence of uttering or passing false coin, as a cheat or fraud practiced on its citizens; and, in the case of the *United States v. Marigold* (9 How. 560,) that Congress, in the proper exercise of its authority, may punish the same act as an offence against the United States.").

[13] *See U.S. v. Wheeler*, 435 U.S. 313, 316 n.7 (1978) ("The first case in which actual multiple prosecutions were upheld was *United States v. Lanza* ...").

been found guilty in state court for crimes related to the same acts, namely, manufacturing, transporting and possessing alcoholic beverages.[14] The U.S. Supreme Court, however, held that since two separate sovereigns deriving power from different sources were involved the protection against double jeopardy did not apply. That is, it reduced the protection's potential scope of applicability. Thus, from *Lanza* on, it is unquestionable that protection against double jeopardy only operates with regard to the same sovereign.

> We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject matter within the same territory ... Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other.
>
> It follows that an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each.

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[14] It is important to point out that, given the application of the dual sovereignty doctrine, it does not matter whether the offenses were the same for purposes of the protection against double jeopardy, because the protection simply cannot be invoked, because we are dealing with two separate sovereigns.

Lanza, 260 U.S. at 382.

About fifteen years after *Lanza*, the U.S. Supreme Court decided *People of Puerto Rico v. Shell Co.*, 302 U.S. 253 (1937); a case that is particularly relevant to the matter concerning us now, especially considering the disproportionate weight that a majority of this Court attributes to that case. First of all, we must eliminate any doubt as to the exact controversy involved in the aforementioned case. Pursuant to the words of the U.S. Supreme Court itself, the matter was limited to addressing whether the third section of the *Sherman Act*, 15 U.S.C. § 33, prevented Puerto Rico's insular legislature at the time from promulgating a local statute to deal with the same matters already covered by federal law, that is, unfair market practices or antitrust. *Shell Co.*, 302 U.S. at 255 ("The single question which we have to decide is whether the existence of Section 3 of the Sherman Act ... precluded the adoption of the local act by the insular legislature.").[15] It is evident, then, that what

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[15] The limited statutory scope of the controversy that the U.S. Supreme Court dealt with in *Shell Co.* is evident. It is enough to read the statement made by the Court later on in its opinion: "The only question, therefore, is whether the word 'territory' **as used in section 3 of the Sherman Act**, properly can be applied to a dependency now bearing the relation to the United States which is borne by Puerto Rico." *Shell Co.*, 302 U.S. at 257. *See generally Cordova & Simonpietri Ins. Agency Inc. v. Chase Manhattan Bank N.A., et al.*, 649 F.2d 36, 38-39 (1st Cir. 1981) (addressing the same controversy after the creation of the Commonwealth). To intend to give a broader

the highest court of the United States held was, above all, a statutory interpretation under the *Sherman Act*. Furthermore, it is important to point

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meaning to what was decided by the U.S. Supreme Court in that matter, given the unambiguous words used by said Court would be an attack against an "objective legal reality"; namely, the limited scope of said court opinion. *Cf.* Maj. Op. at 61.

Likewise, to extrapolate the meaning of the word "territory" in *Shell Co.* to other, much more complex contexts is, to say the least, too convenient for adjudicative purposes. Though it is true that Puerto Rico has traditionally been considered a "territory" for purposes of the territorial clause of the U.S. Constitution, this does not necessarily predetermine, in itself, the constitutional relationship between Puerto Rico and the United States throughout time. That is, it is conceivable, for example, that such relationship would change with the mere passing of time as well as the manner in which Congress has legislated in relation to Puerto Rico. *See Consejo de Salud Playa de Ponce v. Rullán*, 586 F Supp. 2d 22 (D.P.R. 2008) (holding that, in view of the historical relationship between the U.S. and Puerto Rico, the latter has become an incorporated territory). Thus, to accept such possibility tends to also accept the possibility that the relationship between both has changed since the promulgation of the Commonwealth's Constitution, which implied the creation of a State and, in turn, the recognition of its constituents' sovereignty.

Nonetheless, it is important to point out that, as revealed through a careful examination of the complex history of the United States government and its relationships with territorial possessions and the complexity underlying same, we must inevitably conclude that such plenary powers are subject, and *may be subject*, to punctual limitations. For example, it is sufficient to point out the *Insular Cases* themselves, to the extent that they determine the applicability of the U.S. Constitution to territories, which in turn pose a first limitation to the plenary powers of Congress regarding these.

out that, at the time when *Shell Co.* was decided, Puerto Rico was governed by the *Jones Act of 1917*, 39 Stat. 951, the organic act promulgated by Congress in the exercise of its plenary powers over United States territories. *See* U.S. Const. Art. IV, Section 3.[16]

In *Shell Co.*, in a nutshell, the defendants argued in local court that the statute enacted by the insular legislature was inapplicable, because the third section of the Sherman Act, federal legislation, dealt with the same matters. Moreover, they argued that allowing them to be prosecuted in local courts would cause them to be put in jeopardy of being prosecuted more than once for the same offenses, in violation of the protection against double jeopardy established by the U.S. Constitution, given that, by virtue of the Sherman Act, federal courts could also do the same. On the merits, however, *Shell Co.* only held that the local antitrust statute was not in conflict with the relevant provision of the Sherman Act, that is, the statute was a valid exercise of Puerto Rico's insular

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[16] Regarding the plenary powers of Congress with regard to U.S. territories, *see, e.g.*, *Late Corporation of the Church of Jesus Christ of Latter-Day Saints et al. v. United States*, 136 U.S. 1 (1890); *First Nat. Bank v. Yankton County*, 101 U.S. 129; (1879) *American Ins. Co. v. 356 Bales of Cotton*, 26 U.S. 511 (1826). Furthermore, we must inevitably take into consideration the so-called *Insular Cases* that revolve around the applicability of the U.S. Constitution in territories, as these are or not incorporated to the United States. *See, inter alia*, *Balzac v. Porto Rico*, 258 U.S. 298 (1922); *Dorr v. U.S.*, 195 U.S. 138 (1904); *Downes v. Bidwell*, 182, U.S. 244 (1901).

legislature. Thus, in summary, the doctrine established in *Shell Co.* is limited to holding that the third section of the *Sherman Act* did not prevent the insular legislature of Puerto Rico from enacting a local statute pertaining to the same subject matter.

With regard to the arguments of potential double jeopardy, in *Shell Co.*, the U.S. Supreme Court merely stated by *dicta,*[17] that in any event the constitutional protection in question would not be violated. Thus, taking into consideration the prevailing historical circumstances,[18] it held that

> [t]he risk of double jeopardy does not exist. Both the territorial and federal laws and the courts, whether exercising federal or local jurisdiction, are creations emanating from the same sovereignty. Prosecution under

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[17] *See Waller v. Florida*, 397 U.S. 387, 393 n.5 (1970) ("See also Puerto Rico v. Shell Co. (P.R.), Ltd., 302 U.S. 253, 58 S.Ct. 167, 82 L.Ed. 235 (1937), where the Court in **dicta** approved of *Grafton*."). (Emphasis added.) *See also Castro García*, 120 P.R. Dec. at 761 ("[I]n the case of Puerto Rico v. Shell Co. ... the application of the dual sovereignty doctrine to Puerto Rico was not in controversy, therefore, the statements made therein are dictum.").

[18] Irrefutable evidence of the fact that the U.S. Supreme Court did indeed take into consideration the prevailing historical circumstances is that it made sure to analyze Puerto Rico's constitutional situation at the time and further took into consideration the organic laws prevailing at the time in the Country. *See Shell Co.*, 302 U.S. at 257-64.

> one of the laws in the appropriate court, necessarily, will bar a prosecution under the other law in another court. *Shell Co.*, 302 U.S. at 264 (citing *Balzac v. Puerto Rico*, 258 U.S. at 312; *Grafton v. United States*, 206 U.S. 333 (1907)).

Lastly, with regard to *Shell Co.*, it is important to underscore that, as stated above, that case was decided under other historical circumstances. Its interpretation of the constitutional situation of Puerto Rico in its relations with the United States is, to say the least, anachronistic. Therefore, the statements made in *Shell Co.*, at a historical time when the Puerto Rican political system was a creature of the U.S. Congress, under the *Jones Act*, cannot be used to interpret the Commonwealth, as the creation of the Commonwealth in turn recognized a political community duly organized through its own constitutional process. The disproportionate importance that a majority of this Court gives this precedent is by all means wrong.

After *Shell Co.* was decided, the subsequent development of the dual sovereignty doctrine did not imply any major deviations with regard to its guiding principle: the sovereignty of the authority that intends to criminally prosecute an individual. In *Jerome v. U.S.*, 318 U.S. 101 (1943), for example, and in accordance with said principle, it was reaffirmed, in general terms, that "the double jeopardy provision of the Fifth Amendment does not stand as a bar to federal prosecution though a state conviction based

on the same acts has already been obtained." *Id.* at 105 (citing *Lanza*, 260 U.S. 377; *Herbert v. State of La.*, 272 U.S. 312 (1926)). Likewise, in *Bartkus v. People of State of Ill.*, 359 U.S. 121 (1959), the U.S. Supreme Court held that since two separate sovereigns were involved an acquittal in criminal proceedings at the federal level does not stand as a bar to subsequent prosecution, for the same crimes, in state court. *Bartkus*, 359 U.S. at 133-34. Moreover, in *Abbate v. U.S.*, 359 U.S. 187 (1959), it held, for similar considerations, that a state conviction did not stand as a bar to subsequent prosecution in federal court. *Abbate*, 359 U.S. at 193-96.[19]

It was not until *U.S. v. Wheeler*, 435 U.S. 313 (1978), when the U.S. Supreme Court was for the first time faced with an *atypical sovereign* within the scope of the dual sovereignty doctrine.[20] In *Wheeler*,

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[19] In *Abbate* the petitioners petitioned the Court to set aside the rule established in *Lanza*. This, however, did not prevail. The U.S. Supreme Court, therefore, expressly reaffirmed the effectiveness of said rule. *Abbate*, 359 U.S. at 195. It based its decision on the difference between federal and state interests, and the disparity in the vindication of such interests that would result from overruling the rule established in *Lanza*, to the extent that it allows dealing with both interests satisfactorily.

[20] As an initial matter, it was unusual for the decision of the U.S. Court of Appeals for the Ninth Circuit overturned by the U.S. Supreme Court in *Wheeler* to have compared the Indian tribes to the Commonwealth to determine that the tribes are not sovereigns for purposes of the dual sovereignty doctrine. *See U.S. v. Wheeler*, 545 F.2d 1255, 1257 (9th Cir. 1976) ("But

a member of the Navajo tribe, Anthony Robert Wheeler, was sentenced by a tribal court, after pleading guilty to disorderly conduct and delinquency of a minor, both conducts being defined as crimes in the Navajo Tribal Code. A little over a year later, he was charged with statutory rape in the United District Court for the District of Arizona. Wheeler, for his part, asked the Court to dismiss the charge, because his conviction in tribal court for an included misdemeanor stood as a bar to his prosecution in federal court. That is, he claimed that the dual sovereignty doctrine did not apply between the Indian tribe and the federal government.

The U.S. Supreme Court, in addressing such claims, ruled that the Indian tribes, given the historical peculiarities that have determined their

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at the same time they [the Indian tribes] do not have the sovereign status of a state. Nor is their 'semi-independence' like that accorded the Commonwealth of Puerto Rico.") (citations omitted) (overruled in *Wheeler*, 435 U.S. 313). Furthermore, said appellate circuit based its decision not to recognize Indian tribes as sovereigns on the restrictive interpretation made by the U.S. Supreme Court regarding dual sovereignty. *See id.* at 1257 ("The Court has construed its 'dual sovereignty' rationale narrowly and has never applied it outside of the federal court or state court context.") (citing *United States v. Kagama*, 118 U.S. 375, 379 (1886) ("Indians are within the geographical limits of the United States. The soil and the people within these limits are under the political control of the government of the United States or of the states of the Union. There exists within the broad domain of sovereignty but these two.")). This restrictive interpretation, however, was expressly rejected by the U.S. Supreme Court. *Wheeler*, 435 U.S. at 330.

development at the heart of U.S. federalism, had retained a primeval sovereignty,[21] by virtue of which they were to be considered a separate sovereign for purposes of the dual sovereignty doctrine. *Wheeler*, 435 U.S. at 327-29. Therefore, these tribes derived their authority from a different source than the federal government. Likewise, in *Wheeler*, when faced with the contention that Indian tribes were not sovereigns because of the plenary powers that Congress had over them,[22] the highest federal court ruled:

> We think that the respondent ..., in relying on federal control over Indian

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[21] A sovereignty, however, that was initially limited to the criminal prosecution of members of the tribe. *Duro v. Reina*, 495 U.S. 676 (1990). This, however, changed with congressional legislation *recognizing* that Indian tribes had the authority to prosecute non-member Indians. 25 U.S.C. § 1301 (2). The U.S. Supreme Court, in *U.S. v. Lara*, 541 U.S. 193 (2004), interpreted that such legislation on the part of Congress did not mean a mere *delegation of power* on its part, and that instead it indeed broadened the primeval sovereignty retained by Indian tribes. Thus, it upheld Congress's *recognition* thereof through the promulgation of a statute.

[22] With regard to the plenary powers of Congress regarding Indian tribes, *see Wheeler*, 435 U.S. at 319 ("[C]ongress has plenary authority to legislate for the Indian tribes in all matters, including their form of government.") (citing *Winton v. Amos*, 255 U.S. 373 (1921); *In re Heff*, 197 U.S. 488, 498-499 (1916) (revoked on other grounds by *U.S. v. Nice*, 241 U.S. 591 (1916); *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903); *Talton v. Mayes*, 163 U.S. 376, 384 (1986)).

> tribes, have misconceived the distinction between those cases in which the "dual sovereignty" concept is applicable and those in which it is not. It is true that Territories are subject to the ultimate control of Congress, and cities to the control of the State which created them. But that fact was not relied upon as the basis for the decisions in *Grafton*, *Shell Co.*, and *Waller*. What differentiated those cases from *Bartkus* and *Abbate* was not the extent of control exercised by one prosecuting authority over the other but rather the ultimate source of the power under which the respective prosecutions were undertaken.
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> *Wheeler*, 435 U.S. at 319-20 (citations omitted).

It is important to also point out that in *Wheeler*, the U.S. Supreme Court expressly refused to limit the scope of the dual sovereignty doctrine to relations between the federal government and the various states of the Union. *Wheeler*, 435 U.S. at 330 ("The respondent contends that, despite the fact that successive tribal and federal prosecutions are not 'for the same offence,' the 'dual sovereignty' concept should be limited to successive state and federal prosecutions. But we cannot accept so restrictive a view of that concept, a view which, as has been noted, would require disregard of the very words of

the Double Jeopardy Clause."). Consequently, the highest federal court acknowledged the *atypical* sovereignty of Indian tribes in relation to the federal government.[23]

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[23] The *atypicality* of said sovereignty, when compared to that of the states—constitutionally protected by the Tenth Amendment and jurisdictionally guarded by the Eleventh Amendment—undeniably resulted from the Indian tribes' unique historical situation and the federal government. *See Wheeler*, 435 U.S. at 323 ("Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory...") (citing *U.S. v. Mazurie*, 419 U.S. 544, 557 (1975)). *Cf. Examining Bd. of Engineers v. Flores de Otero*, 426 U.S. 572, 596 (1976) ("We readily concede that Puerto Rico occupies a relationship to the United States that has no parallel in our history...."); *Romero v. United States*, 38 F.3d 1204, 1208 (Fed. Cir. 1994) ("On July 3, 1952, Congress approved the proposed Constitution of the Commonwealth of Puerto Rico, which thenceforth changed Puerto Rico's status from that of an unincorporated territory to the unique one of Commonwealth."); *Cordova & Simonpietri* .649 F.2d at 41 ("In sum, Puerto Rico's status changed from that of a mere territory to the unique status of Commonwealth.").

Once again, and given its importance in the U.S. Supreme Court's decision in *Wheeler* and in *Lara*, it is imperative to remember that the historical circumstances are fundamentally important in determining who is a sovereign and with regard to what it is a sovereign. Historical circumstances that, nonetheless, must be legally evaluated. This is consistent with the dual sovereignty doctrine, which shall not be applied restrictively, as long as the interests it guards are satisfied. *Wheeler*, 435 U.S. at 330-332. Furthermore, said conception of sovereignty, historically contextualized, shows, in its due complexity, the various nuances that inform power relations in U.S. federalism.

Finally, it is important to underscore the indispensable elements that, in one way or another, condition the recognition of sovereignty in these cases. Above all, the different interests between the federal and the tribal governments, given that the vindication of such interests on the part of one of the governments, does not necessarily entail the vindication of such interests on the part of the other. Articulation of these independent interests, therefore, is based on the fact that, in one case or another, distinct political communities are involved. *Wheeler*, 435 U.S. 313 (1978). Thus, these political communities—apart from the political subjection of one to the other, by virtue of the plenary powers of Congress—are justly distinguished in accordance with their diverse traditions and customs. *See Wheeler*, 435 U.S. at 331 ("They [the Indian tribes] have a significant interest in maintaining orderly relations among their members and in preserving tribal customs and traditions, apart from the federal interest in law and order on the reservation."). It would be absurd to think that Puerto Rico, as a political community duly organized in constitutional order, does not have similar interests.

It can be deduced from the foregoing discussion that the indispensable element on which the application of the dual sovereignty doctrine is conditioned is that: we must be dealing with two separate sovereigns that derive their power to punish from different sources. In the case of Puerto Rico, then, we must analyze whether, indeed, the Commonwealth derives its power to punish crime from a different source than the federal

government.[24] Therefore, we must determine the source of the coercive power exercised by the Commonwealth. First, however, we must seriously ask ourselves what this power means and what its

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[24] Regarding the *distinct* nature of the Commonwealth, in comparison with the political regime under the organic laws passed by Congress, it is sufficient to cite the most eminent Puerto Rican jurist, Mr. José Trías Monge:

> **If the foundation of the Commonwealth meant anything at all, it was the creation of an entity different from the one existing under the former organic laws.** Though the outlines are not very precise, the decision of the Supreme Court and the U.S. Court of Appeals leave no room for doubt as to the *different* nature of the new political body. The application of certain provisions of the United States Constitution to Puerto Rico is better explained by another concept: the people of Puerto Rico simply *consented* to it. One of the conditions imposed by Law 600 or the framework law was that the Constitution of Puerto Rico had to be adjusted to the terms and to 'the applicable provisions ... of the United States Constitution.' The consent of the people of Puerto Rico, expressed through the referendum held to approve Law 600, is clearly the current basis for the application of certain provisions of the United States Constitution to the people of Puerto Rico.
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> José Trías Monge, *El Estado Libre Asociado ante los tribunales 1952-1994* [The Commonwealth before the Courts 1952-1994], 64 UPR L. Rev. 1. 42 (1995) (Citations omitted). (Emphasis added.)

essential attributes are; especially in the particular context of Puerto Rico as an integral part of the United States federal system. This inevitably leads us to ask ourselves, as opposed to the majority of the Court that signed the opinion, which evades this question, "*What is sovereignty?*"[25]

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[25] The majority opinion correctly states that "[t]he use of the word 'sovereignty' *in another context and for other purposes* is irrelevant in addressing the controversy before us." Majority Opinion, at 19. (Emphasis added). However, we need to define the implications of the use of the word "sovereignty" in the context of this controversy. Therefore, that statement, without more, does not meet the level of rigor required to address the controversy concerning this Court. That is, in a topic as complex as the matter of dual sovereignty, we necessarily must address the semantic dimensions of the term "sovereignty" in order to specify its meaning in the context that concerns us. Likewise, it is fundamental to examine the very nature of sovereign power, and the scope of its exercise, in order to definitively decide what its ultimate source is, or better yet, from what source it is derived. For this, it is also indispensable that we not lose sight of the complexity underlying the political relations that arise in U.S. federalism. Thus, to state that sovereignty is merely "the ultimate source of power" is surprising, since, to say the least, it is an incomplete and irresponsible definition, because it fails to deal with a whole series of issues that are incidental to this definition, which are particularly relevant to a case such as the Commonwealth, a political entity *sui generis* in U.S. constitutionalism. In short, in order to decide question of whether the Commonwealth should be considered "sovereign" for purposes of the dual sovereignty doctrine, we must necessarily formulate a precise definition of the term "sovereignty" and of the nature of the power that the very sovereign exercise. And such definition must also be doctrinally consistent and, therefore, applicable to

IV

The term sovereignty cannot be defined precisely or with semantic certainty. *See United States v. Spelar*, 338 U.S. 217, 224 (1949) (Frankfurter, J., concurring) ("The very concept of 'sovereignty' is in a state of more or less solution these days."); Naomi Hirayasu, *The Process of Self-Determination and Micronesia's Future Political Status Under International Law*, 9 U. Haw. L. Rev. 487, 526 (1987) ("Commentators agree that sovereignty is an elusive and relative concept."). Since its initial theoretical formulation at the end of the Sixteenth Century until today, the concept has acquired various meanings.[26] In the words of our famous jurist, Mr. José Trías Monge:

> Another fanciful issue is the question of sovereignty. This old concept, which harks back to the sixteenth and seventeenth centuries, when it had a role in the development of the modern state, has for a long time now been put to use in the field of colonial governance, besides at

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the states, to the federal government and to Indian tribes. Once this distinction is made, then we can proceed to evaluate the case of the Commonwealth, which is so particular that it is improper to decide such a complex dilemma with an anachronistic invocation of the term "territory."

[26] *See generally* Ruth Lapidoth, *Autonomy: Flexible Solutions in Ethnic Conflicts* 41-47 (1997).

> times having temporarily become a hurdle to the growth of associations or peoples like the European Community. Sovereignty has been primarily and wrongly used as a synonym of indivisible power and as an indispensable attribute of a nation. Present thinking about sovereignty deals with the concept in a very different manner. **Sovereignty, like power, can be shared and does not necessarily rest in a single place.**
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> José Trías Monge, *Injustice According to Law*, in *Foreign in a Domestic Sense. Puerto Rico, American Expansion and the Constitution* 236 (Christina Duffy Burnett & Burke Marshall eds., 2001). (Emphasis added).[27]

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[27] *See also* José Trías Monge, *Injustice According to Law*, *supra*, at 237 ("'Sovereignty,' again, is another of the concepts in territorial parlance which should be rethought, together with those of 'participation,' 'plenary powers,' 'possession,' 'foreign in a domestic sense,' and the like. Talk about 'sovereignty' adds nothing meaningful to the realities of power and succeeds only in being offensive to the dignity of relationships based on the principle of equality or comparability of rights. **Old talk about undivided sovereignty is part of the language of subjection and should have no place in the decolonization context.**") (citations omitted); Ruth Lapidoth, *supra*, at 47 ("[T]he concept of sovereignty—in its classic meaning of total and indivisible state power—has been eroded

Likewise, when addressing the complexities entailed in defining—legally[28] and for our purposes—the concept "sovereignty," we can distinguish between "internal sovereignty" and "external sovereignty."[29] Cf. Donard Pharand, *Perspectives on*

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by modern technical and economic developments, as well as by certain principles included in modern constitutional and international law. As a result of innovations in the sphere of communications and transportation, state boundaries are no longer impermeable, and all national economic systems have become interdependent .... Similarly, according to Luzius Wildhaber, '[s]overeignty must be mitigated by the exigencies of interdependence.' This can be done, since 'sovereignty is a relative notion, variable in the course of times, adaptable to new situations and exigencies.'") (citations omitted). Cf. Joseph E. Horey, *The Right of Self-Government in the Commonwealth of the Northern Mariana Islands*, 4 Asian-Pac. L. & Pol'y J. 180, 191 (2003) ("It has long and widely been recognized, however, that absolute power to rule is not the only, or even the ordinary, meaning of the term and that other meanings of 'sovereignty' exist that are fully capable of accommodating a 'self-government' conformable to the U.N.'s definitions.") (citations omitted). *See also id.* n.42 (citing numerous legal interpretations of the concept "sovereignty").

[28] Tautology, that, nonetheless, is worth repeating: concepts, as discursive constructions inserted in various semantic planes, can acquire different meanings. Thus it is imperative that we not lose sight of this *reality* when defining the sense of a concept used in the legal sphere. Otherwise, the exercise would be one of abstraction that does not contribute much to the interpretative work incumbent on judges and the legitimacy of their duty.

[29] On "external sovereignty," that is, within the scope of Public International Law, *see, inter alia*, Ian Brownlie, *Principles of Public International Law* 290-98 (7th ed. 2008).

Sovereignty in the Current Context: A Canadian Viewpoint, 20 Can.-U.S. L. J. 19 (1994). In the present context—that is, whether the Commonwealth is a sovereign entity for purposes of the criminal prosecution of an individual—it is obvious that we are interested in the internal aspect of sovereignty. This type of sovereignty could very well be defined, in modern times, as the authority that a political community, duly organized—that is, constitutionally organized[30]—has to govern its own plans with regard to primary social relations among the subjects constituting it. In other words, the power that a particular political entity has to govern the areas of interest that have traditionally been subsumed into the concept of *police power*. *See* D. Benjamin Barros, *The Police Power and the Takings*

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[30] *See* Gerardo Pisarello, *Un largo Termidor: Historia y crítica del constitucionalismo antidemocrático* 29 (2012) ("[T]he expression "Constitution," derived from the Latin word *cumstatuire* (to institute together with), is far from a modern invention. On the contrary, it was also used in Antiquity and the Middle Ages in contexts in which the State, as known since the modern era, did not exist. The term was used to refer to what later came to be known as the material concept of Constitution, that is, the manner in which a political community exists and the structures of power sustaining it, including existing class relations.") (citations omitted). Therefore, the term "constitution" is used in this material sense to mean the manner in which the sovereign powers of states have modernly been constituted, though subject to the complex and plural relations of power and interdependence that, in turn, imply a limit in the exercise of such constitutionally constituted sovereignties.

Clause, 58 U. Miami L. Rev. 471 473 (2004) ("The term 'police power' is generally, but vaguely, understood in American jurisprudence to refer to state regulatory power."); Justice Philip A. Talmadge, *The Myth of Property Absolutism and Modern Government: The Interaction of Police Power and Property Rights*, 75 Wash. L. Rev. 857, 861 (2000) ("The exercise of police power—governmental action to advance public health, safety, peace, and welfare—has long been a part of the very nature of government itself."); *see also* Santiago Legarre, *The Historical Background of the Police Power*, 9 U. Pa. J. Const. L. 745 (2007).

Taking into consideration the foregoing discussion, it is worth refining the concept of internal sovereignty to adapt it to the present context. Thus, it could very well be said that internal sovereignty, within the legal sphere, can be translated as the—sovereign—authority that a given political entity has to regulate aspects pertaining to families, private patrimonial relations, safety and, in general, wellbeing. *E. N.Y. Sav. Bank v. Hahn*, 326 U.S. 230, 232-33 (1945) ("A more candid statement is to recognize, as was said in *Manigault v. Springs*, *supra*, that the power 'which, in its various ramifications, is known as the police power, is an exercise of the sovereign right of the government to protect the general welfare of the people, and is paramount to any rights under contracts between individuals.'") (citations omitted). *See also Barbier v. Connolly*, 113 U.S. 27, 31 (1884). It is important to specify also that this (sovereign) Commonwealth. *Id.*

at 204 (citing with approval *Córdova & Simonpietri*, 649 F.2d 36, 39-41 (1st Cir. 1981)).

Thus, the possibility of distinct sovereign powers, hierarchically defined and horizontally distributed,[31] is accepted, though subject to a limited central power, namely, the federal government. José Trías Monge, *Injustice According to Law*, *supra*, at 236 ("[T]he United States is itself, like other federations, a prime example of sovereignty apportioned between various units and a central government.") We can undeniably deduce from the foregoing that the concept of sovereignty, considering the complexity of power relations implied and predetermined in the U.S. federal system, does not have an unambiguous meaning. Moreover, we must imperatively define it taking into consideration the various contexts in which it operates. In this case, the internal relations

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[31] The horizontal distribution of sovereign powers in the U.S. federal system fundamentally alludes to the position of all the powers that are not federal. However, we would have to distinguish between various positions in such horizontality. That is, the scope of the sovereign powers delimited by the superior sovereignty of the federal government would depend on the identity of the political entity embodying them. Thus, a state would be subject to different limitations than, for example, an Indian tribe, a territory, or a *sui generis* entity such as the Commonwealth, even when the powers that Congress exercises on it stem from the territorial clause. *Cf. Examining Bd. of Engineers, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 596 (1976) ("We readily concede that Puerto Rico occupies a relationship to the United States that has no parallel in our history...").

of a given political community, duly recognized as such by Congress.

V

A

It is well-known that at the end of the Spanish-American War, Puerto Rico, as booty, became a possession of the United States, subject to the sovereignty of the United States. *See* Treaty of Paris, 30 Stat. 1754 (1899). After a brief period of military government, in 1900 the U.S. Congress, exercising its territorial powers under Article IV of the U.S. Constitution, enacted the Foraker Act, 31 Stat. 77 (1900), which laid down, though in a limited manner, the Island's civil government. Furthermore, shortly thereafter, in 1917, Congress enacted the Jones Act, 39 Stat. 351 (1917), which established in greater detail, though summarily, the measures of self-government that had been granted to the Island under the prior legislation. In addition, it granted Puerto Ricans U.S. citizenship.

An exceptional characteristic of this legislation is that Congress enacted it exclusively by virtue of its plenary powers over Puerto Rico. Therefore, there was no involvement whatsoever on the part of the Puerto Rican people. The legitimacy of the power structure created in accordance with this legislation stemmed from the legitimacy of Congress' exercise of its powers. Strictly speaking, there was not yet a State to govern the Island, other than the federal government. Therefore, the exercise of public authority during those years was properly speaking

a delegated power to the extent that Puerto Ricans did not participate in its configuration.

B

As a result of insistent demands for autonomy, in 1950, Congress enacted Law 600, 64 Stat. 319 (1950), which empowered Puerto Ricans to take on the task of drafting and enacting their own constitution.[32] Moreover, the enactment of this law implied that Puerto Rico was being recognized as a distinct political community[33] and it established the basis for

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[32] It is worth pointing out that the mechanism by which the drafting and adoption of a constitution is authorized is extremely similar to the process by which states are admitted into the Union. *See* Eric Biber, *The Price of Admission: Causes, Effects, and Patterns of Conditions Imposed on States Entering the Union*, 46 Am. J. L. Hist. 119, 127-28 (2004). **In the case of Puerto Rico, however, there is no dispute that the adoption of our Constitution was not a prelude to eventual admission to the union, as a state.** The latter may explain the interest in disparaging or undervaluing such historical process.

[33] In order to remove any doubt as to the implications that the enactment of Law 600 had for the political development of Puerto Rico, it is sufficient to cite the words of Judge Magruder:

> **The answer to appellant's contention is that the constitution of the Commonwealth is not just another Organic Act of the Congress. We find no reason to impute to the Congress the perpetration of such a monumental hoax. Public Law 600 offered to the people of Puerto Rico a 'compact' under which, if the people accepted it, as they did, they were authorized to 'organize**

> **a government pursuant to a constitution of their own adoption.'** 64 Stat. 319. Public Law 600 required that such local constitution contain a bill of rights, but it did not require that the bill of rights so adopted by the people of Puerto Rico must contain a guaranty of jury trial. Notwithstanding the fact that under the terms of the compact the constitution as drafted by the local constitutional convention and approved by the people of Puerto Rico had also to be approved by the Congress of the United States before going into effect, it is nevertheless true that when such constitution did go into effect pursuant to the resolution of approval by the Congress, 66 Stat. 327, it became what the Congress called it, a 'constitution' under which the people of Puerto Rico organized a government of their own adoption. This Constitution was drafted by the people of Puerto Rico through their duly chosen representatives in constitutional convention assembled. It stands as an expression of the will of the Puerto Rican people.

Figueroa v. People of Puerto Rico, 232 F.2d 615, 620 (1st Cir. 1956).

For all practical purposes, the majority considers that Public Law 600 is just another federal law. That, in turn, implies that the consent of the People of Puerto Rico expressed democratically by a cast of votes was a mere insignificant spectacle of little or no relevance, even though said consent was an indispensable condition for the validity and legitimacy of the statute and the Constitution that it made viable. Moreover, the opinion signed by the majority regarding Law 600 ignores and disregards the interpretation made of Law 600 by the U.S. Court of Appeals, whose opinions, given its hundred-year-old relationship with Puerto Rico, should have significant weight on what pertains to the meaning and scope of the political

a new territorial relationship between the United States and the Island. This law was also approved by the People of Puerto Rico through a referendum held to that effect. Therefore, we must imperatively point out that

> [t]he keystone and legitimacy of Commonwealth status is the principle of the consent of the governed. It was so stated by Congress in laying the foundations upon which Puerto Rico's new status was to be built: "fully recognizing the principle of government by consent," Congress declared in 1950, "this act [Public Law 600] is now adopted in the nature of a compact so that the people of Puerto Rico may organize a government pursuant to a constitution of their own adoption."" At first glance, Public Law 600 may be read merely as having furthered the right of the Puerto Rican people to constitute themselves, as a polity, according to their own design; that is, to establish a local government. A finer reading of its provisions, however, shows that Public Law 600 was not so narrow in scope; it

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process that preceded the creation of the Commonwealth. Evidently the majority thinks that this political process between the government of the United States and the People of Puerto Rico was a joke, a farce, an elaborate deception.

> also set forth the basis for a new relationship between the people of Puerto Rico and the United States."
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> Salvador E. Casellas, *Commonwealth Status and the Federal* Courts, 80 UPR L. Rev. 945, 948-49 (2011).[34]

Thus, after the Constitutional Convention was held, in 1952, after being passed by referendum by the People of Puerto Rico, the Constitution took effect. With it, the Commonwealth came to life both

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[34] *See also* Resolution No. 23, *Diario de Sesiones de la Convención Constituyente de Puerto Rico* [Legislative Record of the Constitutional Convention], *supra*, T. IV, at 2410 ("When the Constitution takes effect the people of Puerto Rico will be organized in a commonwealth, constituted in accordance with the terms of consent established by common agreement, which is the basis of our union with the United States of America... We thereby have reached our goal of having our own government, disappearing from the principle of compact any colonial vestiges, and entered into an era of new developments in democratic civilization. Nothing can surpass in terms of political dignity the principles of free and mutual consent and agreement. The spirit of the people of Puerto Rico must feel free to embark on its great present and future ventures. Other forms of the Puerto Rican State may be developed from such complete political dignity by varying the compact by common agreement."); José Trías Monge, *supra*, at 46 ("The theory of consent also provides here a more adequate basis to explain the resulting relationship between the parties."); Hon. Calvert Magruder, *The Commonwealth of Puerto Rico*, 15 U. Pitt. L. Rev. 1, 10 (1953) ("There is no doubt they [Puerto Ricans] thought something great and significant was happening...") (citations omitted).

politically and legally. Leaving aside any differences of opinion regarding the *meaning* of the constitutional process that allowed the creation of the Commonwealth over the relations between Puerto Rico and the U.S.A., we must imperatively conclude that the legitimacy of the political entity prevailing in our Country is grounded on the conditional recognition of sovereignty that the constitutional process that preceded it entailed, not on a mere delegation of powers sanctioned *solely and unilaterally* by Congress.

The truth of the matter is that Congress, in approving our Constitution, *relinquished* its plenary powers regarding Puerto Rico in what pertains to internal affairs, which were henceforth to be governed by our own laws, pursuant to *our* own Constitution. Such affirmation is also backed by interpretations of the highest federal court regarding the constitutional process that led to the creation of the Commonwealth. The U.S. Supreme Court, in *Flores de Otero*, addressing the meaning of the political process that preceded the creation of the Commonwealth, understood that Congress relinquished its control over the internal affairs of the Island. *See Flores de Otero*, 426 U.S. at 596 ("[A]fter 1952, when Congress **relinquished** its control over the organization of the local affairs of the island and granted Puerto Rico a measure of autonomy comparable to that possessed by the

States ...").[35] Thus, in accordance with such relinquishment, the Commonwealth became sovereign in any and all affairs not regulated by the U.S. Constitution. *See Calero-Toledo*, 416 U.S. at 673-74 (citing with approval *Mora v. Mejías*, 115 F. Supp. 610 (D.P.R. 1953); *Marín v. University of Puerto Rico*, 346 F. Supp. 470, 481 (D.P.R. 1972); *Suárez v. Administrador del Deporte Hípico de Puerto Rico*, 354 F Supp. 320 (D.P.R. 1972); *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 339 (1986) (citing with approval *Calero-Toledo*); *Rodriguez*, 457 U.S. at 8 (citing with approval *Calero-Toledo* and *Córdova & Simonpietri).*

The foregoing, therefore, requires recognition that Congress, by virtue of its plenary powers, can self-impose limits on the exercise of such power, granting its territories measures of self-government which give rise to vested rights in such powers of government that cannot be withdrawn by a subsequent Congress.[36] *See Cincinnati Soap Co. v.*

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[35] Note the use of the term *relinquished*, which can be defined as follows: "voluntarily cease to keep or claim; give up." *The New Oxford American Dictionary* 1439 (2001). The use of this term, therefore, contradicts, once again, any notion that Congress, in endorsing the Puerto Rican constitutional process, merely delegated its powers.

[36] This was recognized by former U.S. Supreme Court Chief Justice William Rehnquist. In a memorandum he signed regarding the federal government's negotiations with Micronesia, he wrote:

U.S., 301 U.S. 308 (1937) (where Congress grants the Commonwealth of the Philippines part of the plenary powers it exercised under the previous territorial status). And this is not an unusual situation in the history of U.S. constitutionalism. For example, it is sufficient to point out the *Northwest Ordinance of 1787*, an ordinance in which Congress laid down the manner in which the territories to the northwest of the Ohio River were to be treated. In the ordinance, pursuant to its plenary powers under the territorial clause, Congress also self-imposed limitations on the exercise thereof:

> It is hereby Ordained and declared by the authority aforesaid, that the following articles shall be considered as Articles of **compact** between the original States and the people and the states in the said territory, *and forever*

"The Constitution does not inflexibly determine the incidents of territorial status, *i.e.*, that Congress must necessarily have the unlimited and plenary power to legislate over it. **Rather, Congress can gradually relinquish those powers and give what was once a Territory an ever increasing measure of self-government. Such legislation could create vested rights of a political nature, hence it would bind future Congresses and cannot be 'taken backward' unless by mutual agreement."** Memorandum, Micronesian Negotiations, William Renhquist, August 8, 1971, Office of Legal Counsel, Department of Justice. (Emphasis added.)

> *remain unalterable, unless by common consent ...*
>
> *Ordinance for the Government of the Territory of the United States North-West of the River Ohio* (July 13, 1787) in *Contexts of the Constitution* 74 (Neil H. Cogan ed., 1999).[37]

Therefore, we must inevitably conclude that Congress is capable of limiting itself in the exercise of its plenary powers, just as it did when it enacted Law 600 and provided for the Puerto Rican People to adopt [their] own Constitution, fully recognizing Puerto Rico's sovereignty regarding internal affairs. We must keep in mind that this Law very clearly provides: "Fully recognizing the **principle of government by consent**, this Act is now adopted **in the nature of a compact** so that the people of Puerto Rico may organize a government pursuant to a constitution of their own adoption." 48 U.S.C. § 731b. Therefore, we should not be surprised that with regard to the internal affairs of Puerto Rico, federal courts have chosen to speak of a compact.

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[37] Once the U.S. Constitution was ratified, the Northwest Ordinance was in turn ratified by Congress. *See* George H. Alden, *The Evolution of the American System of Forming and Admitting New States into the Union*, 18 Annals of the Am. Acad. Pol. & Soc. Sd. 469, 479 (1901) ("[W]ith the adoption of the ordinance of 1787 and its ratification by Congress under the Constitution the outlines of the system [of admission of states] were definitely established.") (cited in Eric Biber, *supra*, at 126 n.18).

See Calero-Toledo, 416 U.S. at 671 73; *U.S. v. Quiñones*, 758 F.2d 40, 42 (1st Cir. 1985); *Córdova & Simonpietri*, 649 F.2d at 39, 41; *Reeser v. Crowley Towing & Transp. Co., Inc.*, 937 F Supp. 144, 146-47 (D.P.R. 1996). Such self-limitations to the power of Congress on its territories are also consistent with the historical development of federal legislative power. In the words of Judge Magruder:

> In a sense it is true that one Congress cannot limit a succeeding Congress in the exercise of its legislative powers under the Constitution. But there are certainly instances of what amounts to a *fait accompli* pursuant to legislation, which subsequently cannot be undone by the repeal of the legislation. Thus the Congress could not, by the repeal of the Tydings-McDuffie Act undo the grant of independence to the Philippine Islands. Again, when a territory has been admitted to statehood, the status thereby achieved by the people concerned cannot be undone by a repeal of the act of admission and the passage of a new organic act for the local government of the former territory. Nor could a grant of private title to public lands under the homestead laws be recalled by a subsequent Act of Congress. Likewise, it would not be within the power of a subsequent Congress to recall a grant of American citizenship

> duly and lawfully obtained under an existing naturalization act. **These are instances of vested rights, which Congress cannot constitutionally take away.** (Emphasis added.)
>
> Hon. Calvert Magruder, *supra*, at 14 (citations omitted).[38]

To recognize the foregoing, however, does not lead to infer that Law 600 is something that it is not. With the enactment of said statute by Congress, it was clear that Puerto Rico's territorial relationship regarding affairs not included in the legislation would not undergo any changes whatsoever. The scope of the powers retained would not be subject to the various limitations contained in the U.S. Constitution regarding states.[39]

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[38] *See also* José Trías Monge, *supra*, at 48-49 ("[I]t is also worth pointing out the spent and superficial concept that one Congress cannot tie the hands of another. Why not? Can Congress undo the grant of independence to the Philippines? If Congress can detach itself from all its sovereignty over a given people, what remote legal principle bars it from relinquishing part of it? **The difficulty of recognizing Congress's power to enter into compacts with people that were formerly dependent is more emotional than legal.").**

[39] In exercising its plenary powers, Congress may pass legislation to favor Puerto Rico in terms of taxes, without abiding by the limitations of the U.S. Constitution's uniformity clause. U.S. Const. Art. I, Section 8. For example, the now repealed section 936 of the U.S. Internal Revenue Code for a

The recognition of the Commonwealth's internal sovereignty and the interpretation of the relevant facts underlying said recognition, does not contravene, by any means, what was decided by the U.S. Supreme Court in *Califano v. Gautier Torres*, 435 U.S. 1 (1978), and in *Harris v. Rosario*, 446 U.S. 651 (1980). In sum, in these cases, the U.S. Supreme Court upheld the opinion that Congress may legislate differently with regard to Puerto Rico, by virtue of its plenary powers, as long as it had a rational basis to do so. *Harris*, 446 U.S. at 651-52; *Califano*, 435 U.S. at 4. The exercise of such powers clearly exceeds the Commonwealth's scope of sovereignty. That is, the legislation that was brought for consideration to the highest federal court in those cases was related to aspects of Puerto Rico's external sovereignty, namely, its relationship with the federal government and certain welfare programs. Thus, the rule laid down in those cases came down to recognizing that Congress may

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long time granted significant tax advantages to certain companies in the Country. 26 U.S.C. § 936, as amended. *See Pepsi-Cola v. Mun. Cidra*, 186 P.R. Dec. 713, 729 (2012) ("Since the 1920's, it has been the policy of the U.S. Congress to exempt its domestic corporations from the payment of federal taxes on revenues they generate in its possessions, among which Puerto Rico. This benefit was laid down in Section 936 of the U.S. Internal Revenue Code.") (citing C.E. Díaz Olivo, *La autonomía de Puerto Rico y sus lecciones en términos fiscales y económicos* [Puerto Rico's Autonomy and its Lessons in Fiscal and Economic Terms], 74 UPR L. Rev. 263, 276 (2005); F. Hernandez Ruiz, *A Guide Across the Spectrum of Section 936*, 19 U.I.P.R. L. Rev. 131 (1984)). Cf. *Downes*, 182 U.S. 244.

legislate for Puerto Rico without the obstacles laid down in the U.S. Constitution regarding states. *See Ramírez de Ferrer v. Mari Brás*, 144 P.R. Dec. 141, 160 (1997); *Castro García*, 120 P.R. Dec. at 774; *Northwestern Selecta*, 185 P.R. Dec. at 102-3 (Rodríguez, J., Dissenting Op.).[40]

C

As a Court, it is not incumbent on us to sign a historical and political opinion on the events that have defined the creation and development of the Commonwealth.[41] Instead, we must *legally* assess these events. In addition, such assessment must focus on resolving the precise controversy presented to us: to determine whether for purposes of the dual sovereignty doctrine the Commonwealth should be considered a sovereign.

VI

Taking into consideration the foregoing discussion regarding internal sovereignty—founded on the interests of a given, duly constituted, political

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[40] *See also* Casellas, *supra*, at 958; José Trías Monge, *supra*, at 26-27, 46.

[41] History and politics—as academic disciplines—are certainly indispensable to perform a complete legal analysis of any controversy. Thus, to the extent that it is relevant to do so, as has been done throughout this entire dissenting opinion, we will resort to them. But what we cannot do as jurists is twist history and the Law to advance political or ideological opinions, trying to achieve through a court opinion what is exclusively incumbent on the political process.

community—it is evident that the Commonwealth has been granted police power. Moreover, such power protects powers that are sovereign, analogous and equivalent to the powers of the states of the Union. *See, e.g., Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592 (1982) (where the Commonwealth is accorded the capacity to sue by virtue of its *parens patriae* power). *See also Flores de Otero*, 426 U.S. at 594 ("[T]he purpose of Congress in the 1950 and 1952 legislation was to accord to Puerto Rico the degree of autonomy and independence normally associated with States of the Union ....").

In addition, this Court has consistently recognized that the Commonwealth has the police power to vindicate its own interests regarding internal affairs. *See Bomberos Unidos v. Cuerpo de Bomberos*, 180 P.R. Dec. 723, 738-42 (2011); *Domínguez Castro v. E.L.A.*, 178 P.R. Dec. 1, 36-38 (2010). *See also Northwestern Selecta*, 185 P.R. Dec. at 60, 84; *San Miguel Lorenzana v. E.L.A.*, 134 P.R. Dec. 405 (1993); *Marina Ind., Inc. v. Brown Bovery Corp.*, 114 P.R. Dec. 64 (1983); *The Richards' Group v. Junta de Planificación*, 108 P.R. Dec. 64 (1983). It is very interesting to evaluate the definition of the concept that a majority of this Court adopted in *Domínguez Castro*. In that case, it was said that police power referred to "[t]he power ***inherent in the State which is used by the Legislature*** to prohibit or regulate certain activities in order to foster or protect the public order, health, moral and *general wellbeing of the community*, and which can be delegated to the municipalities." *Id.* at 36. It is sufficient to underscore that the adjective *inherent* contravenes

any notion of delegation of powers. That is, to recognize that the police power held by the Legislature of the Commonwealth is inherent, implies recognizing that, indeed, the Commonwealth is a sovereign entity, at least, with regard to its internal affairs, and that it exercises the pertinent powers without any delegation of power whatsoever. This interpretation regarding the Commonwealth's internal sovereignty has been endorsed by the U.S. Supreme Court. *See Rodríguez v. Popular Democratic Party*, 457 U.S. 1, 8 (1982) ("At the same time, Puerto Rico, like a state, is an autonomous political entity, 'sovereign over matters not ruled by the Constitution.'") (citing *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 673 (1974); *Mora v. Mejías*, 115 F.Supp. 610 (PR 1953)). *See also Córdova & Simonpietri*, 649 F.2d 36, 39-42. After all, this is **not** about determining whether after the adoption of the Constitution "Puerto Rico continued to be a territory of the United States subject to the power of Congress, as provided in the territorial clause of the U.S. Constitution." Majority Opinion, at 58. To the contrary, the relevant issue is the current scope of such power, taking into consideration the legislative actions of Congress itself, the fact that it recognized the sovereignty of the Puerto Rican people with regard to internal affairs and relevant judicial precedents. As we have seen in the case of Indian tribes, the mere fact that Congress has plenary powers does not, in itself, prevent the recognition of sovereign entities that are nevertheless subject to such powers.

In light of the foregoing, it is indisputable that the Commonwealth, within the scope of its internal affairs, is a sovereign entity that must be considered as such for purposes of the dual sovereignty doctrine. Remember that "with respect to double jeopardy, the framework supports shifting the doctrine's emphasis away from formalistic questions of 'sovereignty' and towards consideration of the degree to which prosecutions reflect autonomous political and moral decision-making." Zachary S. Price, *Dividing Sovereignty in Tribal and Territorial Criminal Jurisdiction*, 113 Colum. L. Rev. 657, 665 (2013).

VII

In *Castro García*, after performing a careful, detailed and well-informed analysis, based on U.S. constitutional doctrine, this Court held that the Commonwealth was a sovereign for purposes of the dual sovereignty doctrine. Thus, it held that when applying the doctrine, federal prosecution did not bar the Commonwealth from vindicating its—sovereign—interests to safeguard the wellbeing and safety of the Puerto Rican community In fact, this decision was consistent with the opinion of certain federal courts. *See U.S. López Andino*, 831 F.2d 1164 (1st Cir. 1987), *cert. denied*, 486 U.S. 1034 (1988); *U.S. v. Vega Figueroa*, 984 F. Supp. 71 (D.P.R. 1997). *See also U.S. v. González de Modestini*, 145 F. Supp. 2d 171, 174 (D.P.R. 2001). On that occasion, the Court also reviewed relevant precedents and the precise doctrine, in order to address the complex controversy presented for consideration. And, in accordance with the Law, it

enforced the legitimate interests of a State founded on the democratic basis of consent of the Puerto Rican people: The Commonwealth. Today, this Court, in a majority opinion that involves a disconcerting historical revisionism, undermines the careful legal analysis performed and instead opts to renounce its duty to interpret—not capriciously redo—the pertinent legal guidelines.

VIII

I conclude by stressing what is most evident: there can be no doubt that the Court majority's objective is to advance its ideology on the status of Puerto Rico and has used, and will continue to use, legal opinions to do so. This, despite the fact that ideological campaigns are incumbent on the political process, not court decisions. With such an objective, the majority disregards the provisions of our Constitution, our laws, what the social wellbeing of our Country demands and even the provisions of the U.S. Constitution and the precedents of the U.S. Supreme Court. In short, nothing persuades, nothing matters to this majority, when arguments are inconvenient to certain ideological posture. It appears that the only thing that matters to them is achieving through Courts what has not been achieved and should be done through the political process. That is, they are using the court's function as another mechanism to exercise political pressure to pursue their political ideologies, which, conveniently translates into simplistic and out-of-context legal interpretations. In the process, all of our prior opinions regarding Puerto Rico's

constitutional framework are dismantled. To use this higher court for such purposes is profoundly anti-democratic and, therefore, notably and ironically anti-American. It contravenes fundamental notions of how politics should be done and, in the process, tarnishes the legitimacy of this Court. As I have stated before: What a shame!

Based on the foregoing, I strongly dissent from the ahistorical opinion of a majority of this Court which departs from the precedents of the United States Supreme Court and perniciously affects criminal prosecution in our Country. Instead, I would uphold the judgments issued by the Court of Appeals and reaffirm the application of the dual sovereignty doctrine in Puerto Rico.

[illegible signature]
Anabelle Rodriguez Rodriguez
Associate Justice

CERTIFICATE OF TRANSLATION INTO ENGLISH

I, Carol Terry Cés, of legal age, married, a resident of San Juan, P.R.., a professional interpreter/ translator, certified by the Administrative Office of the United States Courts, do HEREBY CERTIFY that I have personally translated the foregoing document and that it is a true and accurate translation to the best of my knowledge and abilities.

In San Juan, Puerto Rico, today, June 25, 2015.

Carol Terry

ATABEX TRANSLATION SPECIALISTS, Inc.
P.O. Box 195044, San Juan, PR 00919-5044

[CERTIFIED TRANSLATION]

Commonwealth of Puerto Rico
COURT OF APPEALS
CAROLINA AND SAN JUAN
JUDICIAL REGION
PANEL VIII

THE PEOPLE OF PUERTO RICO Petitioner v. LUIS M. SÁNCHEZ VALLE Respondent		**APPEAL** Originating in the Court of First Instance, Carolina Part Case No.: VP-2008-2802 TO 2804 **SUBJECT:** Art. 5.01 (2 counts) and 5.04 of the Weapons Act
THE PEOPLE OF PUERTO RICO Petitioner v. JAIME GÓMEZ VÁZQUEZ Respondent	KLCE20121032 KLCE20121325 KLCE20121326 KLCE20121426	**CERTIORARI** Originating in the Court of First Instance, Carolina Part Crim. Case No.: VP2008-2805 to 2807 Subject: Art. 5.01, 5.07 and 5.10 of the Weapons Act
THE PEOPLE OF PUERTO RICO Petitioner v. RENÉ RIVERO BETANCOURT Respondent		**CERTIORARI** Originating in the Court of First Instance, Carolina Part Crim.Case No.: VP2008-2808 to 2811 Subject: Art. 5.01, 5.07 and 5.10 of the Weapons Act

THE PEOPLE OF PUERTO RICO Petitioner v. RAFAEL A. DELGADO RODRIGUEZ Respondent		**CERTIORARI** originating in the Court of First Instance, Carolina Part Crim Case No.: VP-2008-2793 to 2801 **SUBJECT:** Art. 5.01 (2 counts) and 5.04 of the Weapons Act

Panel composed by its president, Judge González Vargas, Judge Carlos Cabrera and Judge Medina Monteserín.

Carlos Cabrera, Carmen Hilda, Reporting Judge

JUDGMENT

In San Juan, Puerto Rico, on December *[hw: 19]*, 2012.

The People of Puerto Rico (the People or the Petitioner), through the Office of the Attorney General, filed the corresponding petitions for *Certiorari* against Mr. Luis M. Sánchez Valle, KLCE20121032, Mr. Jaime Gómez Vázquez, KLCE20121325, Mr. René Rivero Betancourt, KLCE20121326, and Mr. Rafael A. Delgado Rodríguez, KLCE20121426 (jointly the Respondents) on July 24, 2012, September 24, 2012, September 24, 2012 and October 17, 2012, respectively. The Petitioner appears before us requesting review of the decisions issued in criminal cases numbers VP2008-2008 to 2011 of June 8, 2012; VP2008-2802 to 2804 of June 26, 2012; and VP2008-2805 to 2807, also of June 26, 2012; and VP2008-2793 to 2801, of July 11

and 17, 2012, all of them for violations of certain articles of the Weapons Act. Said decisions are identical in terms of their content and are only different in terms of the defendant's case and the sentence imposed. In said decisions, the Court of First Instance, Carolina Part (CFI), granted the motions to dismiss filed by the Respondents pursuant to Rule 64 (E) about double jeopardy. Consequently, of our initiative and pursuant to Rule 80.1, we consolidated all of the captioned matters.[1]

In the motions to dismiss filed throughout the course of the proceedings in the corresponding cases, the defense alleged that the respondents had been convicted in federal court for the same events that gave rise to the local charges, and that continuing with the latter would breach the constitutional provision prohibiting double jeopardy.

After the corresponding procedures, Respondents Luis M. Sánchez Valle, Jaime Gómez Vázquez and Rafael A. Delgado Rodríguez submitted their respective positions in motions complying with order. Respondent René Rivero Betancourt did not do so, although he had been duly forewarned. In the

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[1] On October 23, 2012, in a decision, we granted the *Urgent Motion for Consolidation* filed by the Petitioner for cases KLCE20121325 and KLCE20121326. Case KLCE20121032 was left pending, in which the Petitioner requested review of the decision, also issued on July 26, 2012, dismissing the charges on the same grounds. On December 17, 2012, we ordered the consolidation of KLCE20121426 to KLCE20121032 because the latter was the oldest. All of the appeals, we repeat, refer to the same controversy.

referenced appeals, respectively, the People of Puerto Rico points out the following as the first and only error:

KLCE20121032

The Honorable Court of First Instance erred in dismissing the charges under Rule 64 (E) of the Rules of Criminal Procedure, after conducting an analysis of the political, legal and constitutional relationship between Puerto Rico and the United States of America, and concluding that the elements of the crime adjudged by the federal court, and for which the respondent served time in prison, house arrest and supervised release, constitute the same act, set of acts, or course of conduct and/or are essential elements that make up the offense or offenses with which he is being charged in state court, for which reason there arises a sort of collateral estoppel that prevents a new prosecution of those elements of the offense previously identified, constitutes *res judicata* and violate the constitutional prohibition against double jeopardy contained in the Fifth Amendment of the Constitution of the United States, as well as Article II, Section II, of the Puerto Rico Constitution.

KLCE20121325

The Honorable Court of First Instance erred in dismissing the charges under Rule 64 (E) of the Rules of Criminal Procedure, after conducting analysis of the political, legal and constitutional relationship between Puerto

Rico and the United States of America, and concluding that the elements of the crime adjudged by the federal court, and for which the respondent served eighteen (18) months in prison and three (3) years of supervised release, constitute the same act, set of acts, or course of conduct and/or are essential elements that make up the offense or offenses with which he is being charged in state court, for which reason there arises a sort of collateral estoppel that prevents a new prosecution of those elements of the offense previously identified, constitutes *res judicata* and violate the constitutional prohibition against double jeopardy contained in the Fifth Amendment of the Constitution of the United States, as well as Article II, Section II, of the Puerto Rico Constitution.

KLCE20121326

The Honorable Court of First Instance erred in dismissing the charges under Rule 64 (E) of the Rules of Criminal Procedure, after conducting analysis of the political, legal and constitutional relationship between Puerto Rico and the United States of America, and concluding that the elements of the crime adjudged by the federal court, and for which the respondent served eighteen (18) months in prison, constitute the same act, set of acts, or course of conduct and/or are essential elements that make up the offense or offenses with which he is being charged in state court,

for which reason there arises a sort of collateral estoppel that prevents a new prosecution of those elements of the offense previously identified, constitutes *res judicata* and violate the constitutional prohibition against double jeopardy contained in the Fifth Amendment of the Constitution of the United States, as well as Article II, Section II, of the Puerto Rico Constitution.

KLCE20121426

The Honorable Court of First Instance erred in dismissing the charges under Rule 64 (E) of the Rules of Criminal Procedure, after conducting analysis of the political, legal and constitutional relationship between Puerto Rico and the United States of America, and concluding that the elements of the crime adjudged by the federal court, and for which the respondent served thirty (30) months in prison, plus three (3) years of supervised release, constitute the same act, set of acts, or course of conduct and/or are essential elements that make up the offense or offenses with which he is being charged in state court, for which reason there arises a sort of collateral estoppel that prevents a new prosecution of those elements of the offense previously identified, constitutes *res judicata* and violate the constitutional prohibition against double jeopardy contained in the Fifth Amendment of the Constitution of the United

States, as well as Article II, Section II, of the Puerto Rico Constitution.

It is important at this point, according to the docket, to specify, for each one of the appeals, the pertinent facts that characterize them.

KLCE20121032

Respondent Sánchez Valle, for events that took place on August 22, 2008, was the object of several complaints for violation of Articles 5.01 (two counts) and 5.04 of the Weapons Act. Subsequently, for the same events, criminal charges were filed in federal court. At the same time, the court of instance asked the prosecution and the defense to consider and state their positions in writing regarding questions such as the following: can different charges, for the same events, be heard simultaneously in state court and in federal court? Since the defendant had been subjected to federal charges for the same events that gave rise to the charges filed in state court, should the state jurisdiction yield to the federal jurisdiction and request the dismissal of the charges pending a preliminary hearing?

On August 17, 2009, the prosecution filed a *Motion Complying with Order* to inform and state its position. The defense made no filing. Pending the preliminary hearing, the Respondent reached a plea bargain with the federal prosecution. He pled guilty to two charges and, on December 1, 2008, he was sentenced to serve five months of prison, five months of house arrest, and three years of supervised release. On April 21, 2010, he verbally asked the CFI to dismiss the charges pursuant to Rule 64 (e) of

the Rules of Criminal Procedure. He held that he had been convicted in federal court for the same events that gave rise to the charges being prosecuted in state court. He affirmed that continuing with the proceedings would violate the constitutional provisions against double jeopardy. At that point, the CFI required that the defense and the prosecution state their positions in writing. The defense stated, in essence:

> "... Puerto Rico, because it is a territory of the United States, does not have the authority to establish penalties greater than those established by the federal court, since the authority to punish the citizens of the United States born in Puerto Rico falls exclusively on the United States Congress, which has not delegated said sovereign power on the insular legislature, or recognized the existence of another city in Puerto Rico other than that of the United States."

For its part, the prosecution, in its *Motion Opposing Motion to Dismiss*, pointed out that, based on the doctrine of dual sovereignty, the clause barring double jeopardy does not prevent that the local court and the federal court criminally prosecute the defendant for crimes arising from the same act or offense. It stated, in the alternative, that the requirements needed to raise the defense of double jeopardy were not in place; that the prosecution had started at the local court and the judgment that

could be issued at some point would not constitute cruel and unusual punishment. Two years later, on June 26, 2012, the appealed court issued the decision at hand.

KLCE20121325

On September 26, 2008, for a violation of Articles 5.01, 5.07 and 5.10 of the Weapons Act, the prosecution filed complaints against Respondent Jaime Gómez Vázquez for events that took place on July 9 of that year. Criminal charges were filed in federal court for the same events. Likewise, the CFI required that the defense and the prosecution address in writing the core questions mentioned above. On August 17, 2009, the prosecution filed a *Motion Complying with Order to Inform and State the Position of the Prosecution*. It conducted the corresponding analysis of the doctrine of dual sovereignty and the constitutional provision against double jeopardy. It concluded that "the prevailing practice and legal doctrine is the non-application of the protection against double jeopardy to cases such as the one at hand, in which the defendant is being criminally prosecuted in local court and in federal court for offenses arising from the same act or course of action."

For its part, on August 31, 2009, the defense filed its *Motion Complying with Order*. As reflected in the case docket, the CFI, in the following scheduling of preliminary hearing, left the matter pending to be subsequently resolved. On March 16, 2010, with the case still pending a preliminary hearing at the local level, Respondent Gómez Vázquez reached an

agreement with the federal prosecution. He was sentenced to serve 18 months in prison and three years of supervised release. Immediately after that, on April 21, 2010, he requested the dismissal of the local charges pursuant to Rule 64 (e) of the Rules of Criminal Procedure. He also stated that he had been convicted in federal court for the same events that gave rise to the local charges; that the continuation of the proceedings would breach the constitutional prohibition barring double jeopardy. The court granted the parties the opportunity to support and oppose said request. On August 27, 2010, the defense filed its *Motion Complying with Order and Requesting the Dismissal of the Complaints Pursuant to the Constitutional Provision Against Double Jeopardy*. For its part, the prosecution, on October 21, 2010, filed its *Motion Opposing Motion to Dismiss*. It brought up arguments similar to those mentioned hereinabove. Finally, on July 26, 2012, the appealed court issued the decision at hand. It granted the request for dismissal based on double jeopardy filed by the defense.

KLCE20121326

On September 26, 2008, the prosecution filed complaints for violations of Articles 5.01 (two counts), 5.7 and 5.10 of the Weapons Act against Mr. René Rivero Betancourt based on events that took place on June 4, 2008. Also subsequently, for the same events that gave rise to the complaints, criminal charges were filed in federal court. At that point, the court of instance required that both parties addressed the referenced questions in writing. On

August 17, 2009, the prosecution filed a motion complying with order to inform and state its position. Its analysis was identical. It concluded, likewise, that in cases such as the one at hand the protection against double jeopardy is not applicable just because the defendant is being criminally prosecuted in both the local court and in federal court at the same time, for offenses that arise from the same act or course of action. The defense failed to appear. The CFI informed that it would rule later.

On March 16, 2010, while the case was pending a preliminary hearing at the local level, the Respondent reached a plea bargain with the federal prosecution whereby he pled guilty to two counts and was sentenced to serve 18 months in prison. On April 13, 2010, he verbally requested the dismissal of the charges pursuant to Rule 64 (e) of the Rules of Criminal Procedure. He brought up similar arguments regarding the matter of double jeopardy. After granting the parties a term to support and oppose said arguments, on May 4, 2010 the defense filed a *Motion to Dismiss*. And on May 17, 2010, the prosecution filed its *Motion Opposing Motion to Dismiss*. Regarding this, the defense stated that the proceedings constitute double jeopardy because they involve the same person that was convicted and sentenced to prison in federal court for the same events, on the same date, for the same alleged facts, with the same witnesses, the same offenses, the same rifle with the mutilated serial number and the same charger with the same ammunition. In other words, for the same facts and events that gave rise to the case in the local court. It also stated that

prosecuting and sentencing the Respondent again "for the same events" would constitute cruel and unusual punishment. The prosecution filed a *Motion Opposing Motion to Dismiss*. It maintained the initial request that it had made to the court of instance. Two years later, on June 8, 2012, the CFI granted the motion to dismiss based on double jeopardy filed by the defense.

KLCE20121426

On June 4, 2008, July 3 and 9, 2008, and September 26 of the same year, for events that took place on those dates, the prosecution filed several complaints against Respondent Delgado Rodríguez for violations of Articles 5.01, 5.07 and 5.10 of the Weapons Act. He was charged with committing said offenses in mutual agreement with Mr. Gómez Pastrana and Mr. Rivero Betancourt. Subsequently, criminal charges were brought against him in federal court. Likewise, the court of instance asked the Respondent's defense to submit their position in writing regarding the questions noted hereinabove. On August 17, 2009, the prosecution submitted a motion complying with order to inform and state its position. It reiterated that the protection against double jeopardy does not apply in cases such as the one hand, where the defendant is being criminally processed in local court and in federal court for crimes arising from the same act or course of action. On April 7, 2010, the defense filed its *Motion Complying with Order*. On March 16, 2010, the Respondent, pending the preliminary hearing at the local level, reached a plea bargain with the federal

prosecution. He pled guilty to the charges and was sentenced to serve thirty (30) months in prison, plus three (3) years of supervised release. Regarding that point, the defense verbally requested the dismissal of the local charges pursuant to Rule 64 (e) of the Rules of Criminal Procedure. It stated identical arguments to the effect that continuing with the local charges would breach the constitutional provision against double jeopardy. Faced with said argument, the court of instance ordered the defense to state and support its request in writing; it also ordered the prosecution to do the same.

On May 27, 2010. the defense filed an *Amended Motion Complying with Order*. For its part, on June 14, 2010, the prosecution filed a *Motion Opposing Motion to Dismiss*. It insisted, based on the doctrine of dual sovereignty, that the clause against double jeopardy was inapplicable in this case. Alternatively, the State argued that the requirements needed to raise the defense of double jeopardy were not present; that the criminal prosecution against the defendant in local court had already started and the judgment that would eventually be issued would not constitute cruel and unusual punishment. Finally, on July 11, 2012, the appealed court granted the request for dismissal based on double jeopardy filed by the defense.

According to the foregoing, the appealed decisions are identical in content for all the cases. As a matter of fact, the dismissal that was granted addressed and completely disposed of the charges filed against the respondents. Consequently, it is important to

highlight certain elements of the decision that were considered, such as the historical and constitutional background of the dual sovereignty doctrine and its application to the Commonwealth of Puerto Rico. It was on those terms that the CFI reached the conclusion that supported the dismissal of the charges in question. Among them:

> "... the essential criterion to determine if a political entity is or is not a sovereign for purposes of the doctrine of dual sovereignty is the ultimate source from which said political entity derives its will. The existence or non-existence of 'dual judicial sovereignty' between two political entities in order to forgo the application of the doctrine of double jeopardy, actually depends on whether the ultimate source from which the entities derive their power to criminally prosecute a defendant is different for each or if, on the other hand, it is the same" ...
>
> "... the doctrine of 'dual judicial sovereignty' is based on the caselaw of the U.S. Supreme Court when interpreting Article 1, Section 8 of the federal Constitution, which expressly establishes the powers of the federal government, and Section 19 of the same article, which expressly establishes certain limitations to the

power of the States of the federal constitution, which provides that the powers not delegated to the United States by the Constitution and not barred by same to the States, will be reserved to the respective States or to the People."

"... Likewise, the criminal laws of a territory emanate from the same power as the federal laws, for which reason there is no "dual sovereignty" in the context of the federal and the territorial government; it has thus been held by the Supreme Court in decisions such as *Grafton v. United States*, 206 U.S. 333 (1907) and *Puerto Rico v. Shell Co.*, 302 U.S. 253 (1937) in light of the reality that the legislative power of the territories emanates from the federal Congress or government" ...

"... In the particular case of our island, it is a historical reality that Puerto Rico was one of the territories that were transferred to the United States by Spain with the 1898 Treaty of Paris at the conclusion of the Spanish-American War. By virtue of said treaty, the island ceased to be a Spanish territory and became a U.S. territory. The historical reality and trajectory of Puerto Rico is, therefore,

very different than that of the other States of the Union and of its endemic Native American tribes.

"... contrary to the States of the Union and to the Native American Tribes, Puerto Rico has never enjoyed an original and primeval sovereignty. It was colonized and later transferred by Spain to the United States and it is on that original territorial and colonial condition that its relationship with the United States is founded. Therefore, it does not followt, in our case, to talk about an original and primeval, or pre-federative, sovereignty, as that of the States.

To some authors, it is absurd to want to adapt a doctrine like this one to Puerto Rico, as if [it] shared the sovereignty possessed by the federal government over [the territory]."

"... This court believes that, due to historical reasons and reasons of political, social, legal and constitutional reality, the doctrine of "dual judicial sovereignty" does not apply to the present controversy. We believe that the sovereignty or source of power in Puerto Rico to criminally process its citizens receives and emanates from the federal government through Congress. It is therefore

evident, that the complaints against the gentleman (the respondents) in this court of instance for violation of the articles (of the Weapons Act) in relation to the same events for which [he] has already been convicted in the federal District Court for the District of Puerto Rico, constitute *res judicata* and breach the constitutional prohibition against double jeopardy contained in the Fifth Amendment of the Constitution of the United States, as well as Article II, Section II, of our Constitution" ...

"... Allowing a new prosecution for these events or course of criminal conduct would place the defendant(s) in double jeopardy, since he [they] would be subjected to answering to the State more than once for the same events, and therefore exposed to multiple punishments for the same offense. Since Puerto Rico is not a jurisdiction that has its own judicial sovereignty, separate from the federal judicial sovereignty, because the power of both to prosecute its citizens emanates from the same source: the United States Congress, it is not permissible under the current state of law to submit the defendant to a state prosecution for the same events already judicially decided by a federal

court. Doing so would be equal to answering twice for the same unlawful conduct to the same system, power or jurisdiction.

The court is fully aware, at the time of issuing this decision, of the acute social problem that criminal activity represents in Puerto Rico ..."

II.

A.

Section 11, Article II of the Constitution of the Commonwealth of Puerto Rico establishes the right that a person accused of a crime has when facing the criminal process. Among them is the right that states that "[n]obody will be placed at risk of being punished twice for the same offense." This is known as the protection or defense against double jeopardy. Resumil, O.E., *Derecho Procesal Penal*, Volume 2, at 283-342 (1993); Chiesa, E., *Derecho Procesal Penal de Puerto Rico y Estados Unidos*, Vol. II, at 349-444 (Forum 1992).

In *Pueblo v. Santiago*, 160 P.R. Dec. 618, 627 (2003), the Supreme Court confirmed the statements made in *Pueblo v. Martínez Torres*, 126 P.R. Dec. 561 (1990), stating that the constitutional clause against double jeopardy has the purpose of preventing the State from abusing its authority and harassing a citizen with multiple prosecutions in an attempt to convict him or her for the commission of the same criminal conduct. Additionally, in this way it protects the citizen from living with the uncertainty

that, even if innocent, he or she could be found guilty at any time. It prevents the State from having a second opportunity to present evidence and take advantage of what it learned in the previous trial. Our Supreme Court also clarified the four (4) instances in which the doctrine of double jeopardy is triggered. Regarding this matter, it stated that:

> **The constitutional provision against double jeopardy protects citizens in four instances, to wit: (i) against subsequent prosecution after acquittal for the same offense; (ii) against subsequent prosecution after conviction for the same offense; (iii) against subsequent prosecution after prior prosecution for the same offense (after starting a trial that did not end neither in acquittal nor in conviction), and (iv) against multiple punishments for the same offense. In other words, it protect not only against multiple punishments, but also against multiple or successive prosecutions.** *Pueblo v. Santiago*, *supra*, at 628.

At the same time, in order to invoke the constitutional protection against double jeopardy, the prosecution and the sanction to which the individual is subjected must be criminal in nature or must entail the deprivation of liberty or property that

characterize the criminal proceeding. The trial against the accused must have been initiated or held before a court with jurisdiction and in accordance with a valid indictment. Finally, the second judicial indictment attempting to prosecute the accused must be for the same criminal conduct for which he or she was already convicted, acquitted or exposed. *Pueblo v. Santiago*, *supra*, at 628-629.

On the other hand, the doctrine of double jeopardy does not prevent the court of a State, or of Puerto Rico, and the federal court from criminally prosecuting the same person for offenses arising from the same criminal act. Because they are two different and separate sovereignties—the federal sovereignty and the state sovereignty—emanating from different sources, there is no legal provision that precludes indicting an individual for violating its laws, even if the violations stem from the same events. *Pueblo v. Castro García*, 120 P.R. Dec. 740, 772 (1988)[2] citing *U.S. v. Lopez Andino*, 831 F. 2d 1164. 1167-1168 (1st Cir. 1987).

In keeping with the above, the First Circuit stated the following:

> For the purposes of this appeal, however, it does not matter whether or not the local and federal prosecutions were for different offenses. According

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[2] Associate Justice Negrón García issued a concurring opinion and Associate Justice Rebollo López issued a dissenting opinion.

to the "dual sovereignty" doctrine, successive prosecutions are not prohibited by the fifth amendment if they are brought by separate sovereigns. As the Supreme Court recently described it, "[t]he dual sovereignty doctrine is founded on the common law conception of crime as an offense against the sovereignty of the government. When a defendant in a single act violates the 'peace and dignity' of two sovereigns by breaking the laws of each, he has committed two distinct 'offenses' and is subject to prosecution and punishment for both. *Heath v. Alabama*, 106 S. Ct. at 437

The question before us, therefore, is whether Puerto Rico and the United States are "dual sovereigns" for double jeopardy purposes. Prosecuting entities are considered to be separate for double jeopardy purposes when they derive their power from different sources. *Heath v. Alabama*, 106 S.Ct. at 437; *United States v. Wheeler*, 435 U.S. 313, 319-22, 98 S.Ct. 1079, 1083-85, 55 L.Ed.2d 303 (1978). It is well settled that when States enact and enforce their own criminal laws, they are acting pursuant to their own sovereign power, not that of the national government. *See United States v. Lanza*, 260 U.S. 377, 382, 43

S. Ct. 141, 142, 67 L Ed. 314 (1922). Puerto Rico's status is not that of a State in the federal union, but its criminal laws, like those of a State, emanate from a different source than the federal laws.

Although the legal relationship between Puerto Rico and the United States is far from clear and fraught with controversy, it is established that Puerto Rico is to be treated as a State for purposes of the double jeopardy clause. In 1950 Congress enacted legislation "so that the people of Puerto Rico may organize a government pursuant to a constitution of their won adoption." Puerto Rican Federal Relations Act, Pub. L. No. 600, 64 Stat. 319 (1950). The purpose of the Federal Relations Act "was to accord to Puerto Rico the degree of autonomy and independence normally associated with States of the Union." *Examining Bd. of Eng'rs, Architects and Surveyors v. Flores de Otero*, 426 U.S. 572, 594, 96 S.Ct. 2264, 2277, 49 L.Ed.2d 65 (1976). "Puerto Rico, like a State, is an autonomous political entity,..." *Rodríguez v. Popular Democratic Party*, 457 U.S. 1, 8, 102 S.Ct. 2194, 2199, 72 L.Ed.2d 628 (1982). In *United States v. Benmuhar*, 658 F.2d 14, 18 (1st Cir. 1981), *cert.*

> *denied*, 457 U.S. 1117, 102 S.Ct. 2927, 73 L.Ed.2d 1328 (1982), we held, treating Puerto Rico as a State, that a charge under Puerto Rico law for arson and the destruction of an insured building did not preclude a subsequent federal conspiracy prosecution, even though both were based on the same act.
>
> The offenses for which appellants were prosecuted in superior court were against the Commonwealth, which for double jeopardy purposes is treated as a State. Therefore, the fifth amendment did not prohibit the federal prosecution. *U.S. v. Lopez Andino*, supra.

B.

The dual sovereignty doctrine is based on the recognition that the term itself incites. To overcome the constitutional protection against double jeopardy, in *U.S. v. Lanza*, 260 U.S. 377 (1922), it was considered fundamental that a criminal act could constitute an offense against the peace and dignity of each sovereign, in other words, of two different sovereign States, for which reason they are different offenses that can be punished by each sovereign without it constituting double jeopardy.

On the other hand, the U.S. Supreme Court has still not ruled on whether the dual sovereignty doctrine applies in a similar context to the one at hand, that is, in a criminal prosecution under the

laws of Puerto Rico, followed or preceded by a federal prosecution for the same act or course of conduct, in order to evade the protection against double jeopardy. Notice, as we have seen, that the United States Court of Appeals for the First Circuit held, for purposes of the federal clause against double jeopardy and the application of the dual sovereignty doctrine, that Puerto Rico is considered a State in the federal constitutional scheme. *U.S. v. López Andino, supra.*

In this line, Professor Chiesa, in his book *Tratado sobre Derecho Procesal Penal de Puerto Rico y Estados Unidos*, at 429, when commenting on the basic criterion that would ascribe dual sovereignty to the relationship between Puerto Rico and the United States, expressed that:

> "the particular status of the Commonwealth raises passionate controversies regarding the applicability of the doctrine of dual sovereignty for purposes of the protection against double jeopardy, in the federal-insular context. Of course, when faced with a prosecution by another State, followed or preceded by a federal prosecution, the doctrine of dual sovereignty is applied. But when faced with a criminal prosecution under the laws of the Commonwealth, followed or preceded by a federal prosecution, the applicability of the doctrine of dual sovereignty will

> depend on the answer to the following question: [do] the criminal laws of the Commonwealth emanate from an independent sovereignty or, ultimately, from the federal government? This question has not been addressed—and will probably not be addressed—by the U.S. Supreme Court."

Nevertheless, in Puerto Rico, our Supreme Court, in *Pueblo v. Castro García*, *supra*, has held that a conduct that constitutes a crime both in the federal and in the state jurisdictions can be penalized separately in both jurisdictions without it constituting a violation of the constitutional clause against double jeopardy or implying multiple punishments for the same conduct.[3] Our Supreme Court understood that the dual sovereignty doctrine applies in Puerto Rico. In other words, a conduct that constitutes a crime, both in the federal jurisdiction and in the state jurisdiction, can be penalized independently by both entities without it constituting a violation of the constitutional clause against double jeopardy or implying multiple punishments for the same conduct. Puerto Rico has the power, as if it were a State, to test and enforce a

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[3] In *Pueblo v. Castro García*, as in the cases at hand, the court of instance granted a request for dismissal and ordered that the cases be dismissed because the defendants had been indicted for the same events in the United States District Court for the District of Puerto Rico.

Penal Code, and the government has jurisdiction to apply its penal laws to all the persons that commit crimes within its territorial extension. For its part, the federal government and the state governments have concurrent jurisdiction over innumerable criminal activities.

We deem it convenient to analytically reexamine the content and scope of *Pueblo v. Castro García*, *supra*. In said case, our Highest Court concluded that "there should be no question that for purposes of the dual sovereignty doctrine, Puerto Rico is in a very different legal and political situation than it faced when a ruling was issued in the case of *Puerto Rico v. Shell Co.*, *supra*. We thus hold that the power of the Commonwealth of Puerto Rico to create and enforce offenses emanates not only from Congress, but also from the consent of the People and, therefore, from itself, for which reason the dual sovereignty doctrine is applicable. Denying Puerto Rico the power to enforce its criminal laws, based on the fact that the federal government or a State has won the race against the courts, would be shocking and would entail a deprivation of its historical right and obligation to maintain peace and order within its territory." *Pueblo v. Castro García*, *supra*, at 782.

In its analysis, when faced with a similar controversy, it established as its core starting point the examination of the faculty or power had by the federal government and the States "(including Puerto Rico)" to set and establish offenses and their inter-jurisdictional consequences. The above in specific reference to the execution of that power

regarding the constitutional prohibition of double jeopardy under the Fifth Amendment of the Constitution of the United States and Article II, Section II of our Constitution.

First of all, it acknowledged the difficulty entailed by the analysis due to the fact that, in the United States, the power of the State is divided into two sovereign powers: the national or federal government and the state governments. Within that distribution of powers, it also important to recognize that each State "is a separate sovereign power." The States, as we know, reserve all of the other powers that are not expressly delegated to the federal power by virtue of the Constitution.

The Supreme Court also focused on the power to create offenses from the perspective of the legal principles that it comprises and the importance of their existence in terms of the validity of the criminal laws of every sovereign State in relation to its territory. In line with that analysis, it resorted to legal authors such as La Fave and Scott to illustrate, without leaving a trace of doubt, the broad scope of the power of the federal government to create offenses as well as the constitutional limitations. Likewise, it did the same in relation to the States in contrast with the federal government. It concluded, in general, that naturally there are limitations to this power to create offenses imposed by the Constitution, federal statutes, treaties and by the Constitution of each particular State.

Obviously, it particularly focused its interest in the power of Puerto Rico to create offenses. In the

adjudicative process, it paid attention to the development of federal caselaw, both in relation to the evolution of the dual sovereignty doctrine and to the application of same to Puerto Rico in the context of particular circumstances.

In that sense, the Supreme Court displayed a comprehensive and detailed analysis, taking into consideration the local and federal decisions about the attributes of Puerto Rico's sovereignty before and after 1952. To begin with, it discarded certain expressions made in *Puerto Rico v. Shell Co.*, 302 U.S. 253 (1937) and brought up by the respondent-defendant therein, understanding that they were merely *dictum*. Specifically, that Puerto Rico is not a sovereign country for purposes of the dual sovereignty doctrine. It understood, during the decision-making process, that said expressions had been made contemplating a situation that was not in controversy. It said:

> "In response to a statement about a situation that is not present in the case, the court holds that:
>
> It is equally clear that legislative duplication does not pose a risk of a second prosecution and conviction, or of double punishment for the same offense. There is no risk of double jeopardy. Both the territorial and federal laws and courts, whether exercising federal or local jurisdiction, are permanent creatures of the same sovereignty. [Citations omitted]

> prosecution under one of the laws in the appropriate court, would necessarily preclude a prosecution under the other law in another court." Cited in *Pueblo v. Castro García*, *supra*, at 763.

It then concluded, regarding those expressions, that:

> "Regarding the validity of the expressions made as *dictum* at that time, 1937, we believe that at this time they have lost any legal support and must rest in peace." *Pueblo v. Castro García*, *supra*, at 764.

In that point is sought support in the cases of the U.S. Supreme Court that applied the principle of dual sovereignty "outside of the situation of successive prosecutions in federal and state courts or in the courts of two States." It found *United States v. Wheeler*, 435 U.S. 313 (1978) to be particularly instructive. This, because in said case the U.S. Supreme Court expanded the framework of the scope of the dual sovereignty doctrine, "the U.S. Supreme Court expressly refused to find that only the governments of the States of the federal government can be considered different sovereigns among themselves for purposes of double jeopardy." It also referred that the U.S. Supreme Court recognized that "such a restrictive scope of the concept of dual sovereignty... would require disregarding the very words of the Jeopardy clause." *Pueblo v. Castro García*, *supra*, at 764.

Citing *Heath v. Alabama*, 474 U.S. 82 (1985), opinion of the U.S. Supreme Court confirming the reasoning displayed in *United States v. Wheeler*, *supra*, it incorporated the following expressions:

> *United States v. Wheeler*, 435 U.S. 313 (1978), where the Court upheld successive prosecutions by federal government and Navajo tribal authorities, merely recognizes an analogous relationship between two governments with complementary concerns. While the Court noted that "Congress has plenary authority to legislate for the Indian tribes in all matters, including their form of government." *id.* at 319, Congress has in fact wisely refrained from interfering in this sensitive area. The relationship between federal and tribal authorities is thus in this respect *analogous* to that between the federal government and the States. Cited in *Pueblo v. Castro García*, *supra* at 764-765.

Adopting that reasoning, it affirmed that the same conclusion should be reached regarding Puerto Rico.

> "In 1952, the People of Puerto Rico organized themselves politically under the name of the Commonwealth of Puerto Rico. As authorized by the Law of July 3, 1950 [citations omitted]

> of the 81st Congress of the United States, the people met in assembly through their elected representatives and drafted their own constitution. Since then, the political power of the island emanates from the consent and will of the People of Puerto Rico. Art I Sec. 2 Commonwealth Const. [citations omitted]. The executive, legislative and judicial branches were place under the authority of the People of Puerto Rico by virtue of their will consecrated in the Constitution.
>
> Both the federal caselaw, from the district court to the Supreme Court, as that of this court, have recognized that with the enactment of our Constitution, Puerto Rico obtained a sovereignty similar to that of the States of the union in extremely fundamental matters." *Pueblo v. Castro García, supra,* at 765.

It then referred to *Calero Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974). There, when facing the problem of whether the laws of Puerto Rico were state laws, for purposes of the three-judge court law then in force and effect, in circumstances where the previous caselaw had excluded from that term the then-territory of Hawaii, the U.S. Supreme Court recognized the changes in the Puerto Rico constitutional process. It cited approvingly the opinion in *Mora v. Mejías*, 206 F.2d 377, 387 (1953)

... "Puerto Rico, therefore, does not become a State of the federal union like the 48 States, but it would seem that it becomes a State within the common and accepted meaning of the word. [Citations omitted]. This is a political entity created by a law and with the consent of the People of Puerto Rico and in union with the United States of America under the terms of this agreement." In that measure, the U.S. Supreme Court held that the laws of Puerto Rico were state laws for purposes of the referenced law.

Under the same terms, the Court in its opinion pointed towards other federal caselaw, such as *Rodríguez v. Popular Democratic Party*, 457 U.S. 1 (1981) and *Alfred L. Snapp & Son Inc. v. Puerto Rico*, 458 U.S. 592 (1982). Regarding the latter, it found extremely pertinent the controversy addressed by the U.S. Supreme Court regarding whether Puerto Rico had the legal capacity to maintain a *parens party* action. I concretely referred to the expressions of that court explaining the reasons that justify upholding this type of action, among them having a quasi-sovereign interest that was identified in two ways:

> ... First, the exercise of sovereign power over individuals and entities within the relevant jurisdiction this involves the power to create and enforce a legal code, both civil and criminal; second, the demand for recognition from other sovereigns- most frequently this involves the maintenance and recognition of

> borders. *Id.* at 601. Cited in *Pueblo v. Castro García, supra,* at 760.

Certainly, the Puerto Rico Supreme Court, in the analysis of Puerto Rican constitutional development, expanded on the caselaw of the U.S. Supreme Court, which in different contexts has reiterated the principle that the establishment of the Commonwealth in a certain significant sense altered the relationships between Puerto Rico and federal government. "This, even though said court has never held that Puerto Rico is entitled to all of the benefits granted to the States by the federal Constitution." *Puerto Rico v. Branstad,* 483 U.S. 219 (1987).

Likewise, it pointed to the fact that certain federal courts have recognized in specific contexts that Puerto Rico enjoys a scope of sovereignty similar to that of the States of the Union.[4] It highlighted, in

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[4] Recently, in *United States v. Marcos Laboy Torres,* Judgment of the Third Circuit of the U.S. Court of Appeals, 553 Fed. 3rd. 715 (2009), as stated by Hon. Sandra Day O'Connor, retired associate justice, acting upon designation, the controversy of whether the nature of a conviction in our jurisdiction for possession of marihuana is domestic or foreign under the Firearm Possession Prohibition statute, 18 U.S.C. Sec. 922 (g) (1). Said Court concluded that it was a domestic conviction within the scope of the prohibition of that law. It expressed that Congress had the intent of including Puerto Rico convictions, which is a conclusion that is consistent with Congress and with the treatment that has been given to Puerto Rico in other contexts:

> "Puerto Rico possesses 'a measure of autonomy comparable to that possessed by the States. [citations omitted] ... This government

particular, the persuasive approach that, as we saw before, was provided by the Court of Appeals for the First Circuit in *U.S. v. Lopez Andino, supra*, within the framework of a controversy such as the one at hand.

In conclusion, for purposes of the controversy before our consideration, the analysis displayed by the ultimate interpreter of our Constitution was definitely supported on the basis that, even acknowledging that the United States Congress can legislate on Puerto Rico, that does not mean that the Commonwealth ceases to have the sovereign power to rule on the criminal conduct of its citizens. From there that "under the limited scopes of the dual sovereignty doctrine, nothing prevents Puerto Rico

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enjoys the same immunity from suit possessed by the States [citations omitted]. Like the States, Puerto Rico lacks 'the full sovereignty of an independent nation', for example, the power to manage its 'external relations with other nations', which was retained by the federal government. [citations omitted]. As with citizens of the States, Puerto Rican citizens are accorded United States citizenship, ... and the fundamental protections of the United States Constitution... The rights, privileges, and immunities attendant to United States citizenship are 'respected in Puerto Rico to the same extent as though Puerto Rico were a State of the Union.' [citations omitted]. Finally, Puerto Rican judgments are guaranteed the same full faith and credit as are those of the States." Cited in *United States v. Marcos Laboy Torres*, supra.

from being treated like a State of the Union." *Pueblo v. Castro García*, *supra*, at 774. That is how it has been treated when it has been recognized that Puerto Rico enjoys the attributes of a sovereign for purposes of the doctrine of sovereign immunity and the provisions of the 11th Amendment of the United States Constitution applies to us directly. *Id.* In other words, said amendment prevents damages from being recovered against the Commonwealth of Puerto Rico in federal court.

Having said this, when both forums have concurrent jurisdiction to submit an offender to a criminal prosecution for his or her conduct when infringing both laws, he or she will not be covered by the right that protects from double jeopardy. The doctrine elaborated in relation to said right codified in the Constitution of the United States and in our Constitution does not prevent the courts of a State, or of Puerto Rico, and the federal courts from criminally prosecuting the same person for offenses arising from the same act or course of conduct. *Pueblo v. Castro García*, *supra*.

III.

Having stated the procedural facts of each case in particular and the applicable law, we believe that the core controversy is reduced to whether the act of double jeopardy is manifested in these cases. We saw that a criminal prosecution was initiated against the Respondents under the Weapons Act at the state level, which in term gave rise to a federal criminal prosecution for the same events, acts or conduct. In

other words, two criminal prosecutions took place simultaneously against the Respondents.

The Puerto Rico Attorney General insists that the appealed court erred in concluding that the elements of the offenses decided by judgment of the federal court and for which the Respondents served terms, because they originate from the same act, group of acts or course [of conduct], necessarily imply a sort of collateral estoppel by judgment that prevents those elements of the offense previously adjudged from being prosecuted again. Stated differently, that it erred in understanding that allowing a new prosecution in our jurisdiction under those terms constitutes double jeopardy.

The Attorney General specifically refers to the fact that the Puerto Rico Supreme Court and the Court of Appeals for the First Circuit have acknowledged that Puerto Rico has the power, as if it were a State, to try and enforce a Penal Code; that the government of Puerto Rico has the jurisdiction to apply its criminal laws to any person that commits a crime within its territorial boundaries. Likewise, the federal government and the state governments have concurrent jurisdiction over innumerable criminal activities.

He also underscores that, pursuant to the dual sovereignty doctrine, "nothing prevents that Puerto Rico be treated like a State of the Union. Among other things, the federal courts have expressly recognized that Puerto Rico enjoys the attributes of a State for purposes of the doctrine of sovereign immunity and have applied directly to us the

provisions of the Eleventh Amendment of the Constitution of the United States." In summary, that Puerto Rico, for purposes of the federal double jeopardy clause and the application of the dual sovereignty doctrine, has been equally considered a State within the federal constitutional scheme.

For its part, the defense vehemently argues that the dual sovereignty doctrine is not applicable to Puerto Rico. Our country continues to be an unincorporated territory of the United States of America. Regarding this, it presented and discussed the conflicting trajectory of opinions in different federal circuits. Its posture leaned, after the analysis of the historical and legislative background of Public Law 600 and the applicable federal caselaw, that the "inescapable" conclusion is that Puerto Rico does not possess a source of power separate and different than that of the power of the federal Congress. "We have never enjoyed a separate original sovereignty." In that sense, it coincided with the basis of the concurring opinion of Judge Torruella in *López Andino*, *supra*, as with the opinion issued by the Eleventh Circuit in *U.S. v. Sánchez*, [992 F.3d 1143 (11th Cir. 1992)]. Therefore, the established exception of the dual sovereignty doctrine does not apply to Puerto Rico.

We conclude, based on the current state of law and regarding the application of the dual sovereignty doctrine in Puerto Rico, that when both forums have concurring jurisdiction to submit an offender to a criminal prosecution for his or her conduct infringing both laws, said offender is not covered by the right

that protects against double jeopardy. The doctrine drawn on this right codified in the Constitution of the United States and in our Constitution does not prevent the courts of a State, or of Puerto Rico, and the federal courts, from criminally prosecuting the same person for offenses arising from the same act or course of conduct. *Pueblo v. Castro García, supra.*

Our Supreme Court has held that in a controversy such as the one in caption there are different and separate sovereignties—a federal sovereignty and a state sovereignty—and it has been established that Puerto Rico has the power to create and enforce offenses and to rule on the criminal conduct of its citizens. They are two different sources of power, so there is no legal restriction barring both forums from indicting the individual for violating their laws, even if the violations arise from the same events.

Certainly, an act declared to be a crime by the federal and state sovereignties is an offense against the peace and dignity of both sovereign States and can be punished by both. "Puerto Rico's status is not that of a State of the Union, but its criminal laws, like those of a State, emanate from a different source other than the federal laws." *Pueblo v. Castro García, supra,* citing *U.S. v. López Andino, supra.*

In summary, Puerto Rico, for the purposes that are relevant herein, is a sovereign; it has the power to create offenses different from those of the federal sovereignty, for which the defendants can be submitted to the punishments of both criminal prosecutions. *United States v. Lanza,* 260 U.S. 377

(1922); *Pueblo v. Castro García, supra.* The doctrine of double jeopardy is not applicable; both jurisdictions—the federal jurisdiction and the state jurisdiction—can criminally prosecute the defendants herein for their respective infractions of the Weapons Act. Regarding said law, the federal law is not preemptive and does not prevent the States or Puerto Rico from enacting its own law Without a doubt, the Court of First Instance and this Court are bound by the principles that inspire the doctrine of *stare decisis.* Said doctrine contemplates the respect due to the decisions of the Supreme Court and the stability of the law. Therefore, its decisions must be followed in subsequent cases.

Based on all of the foregoing, the writs requested in cases KLCE201201032, KLCE20121325, KLCE20121326 and KLCE20121426 are hereby issued. The appealed decision is hereby reversed and the case is remanded for the continuation of the proceedings regarding these criminal prosecutions.

Judge González Vargas issues particular vote and Judge Medina Monteserín issues a concurring vote.

It has been thusly agreed and ordered by the Court and certified by the Clerk of the Court of Appeals.

[signed]
Dimarie Alicea Lozada, Esq.
Clerk of the Court of Appeals

[CERTIFIED TRANSLATION]

CERTIFICATE OF TRANSLATION INTO ENGLISH

I, Margot A. Acevedo, of legal age, married, a resident of Shorewood, WI., a professional interpreter/ translator, certified by the Administrative Office of the United States Courts, do HEREBY CERTIFY that I have personally translated the foregoing document and that it is a true and accurate translation to the best of my knowledge and abilities.

In San Juan, Puerto Rico, today, June 29, 2015.

Margot A. Acevedo
ATABEX TRANSLATION SPECIALISTS, Inc.
P.O. Box 195044 San Juan PR 00919-5044

Commonwealth of Puerto Rico
COURT OF APPEALS
CAROLINA AND SAN JUAN JUDICIAL REGION
PANEL VIII

THE PEOPLE OF PUERTO RICO PETITIONER v. LUIS M. SÁNCHEZ VALLE RESPONDENT	KLCE201201032	CERTIORARI Originating in the Court of First Instance, Carolina Part CIVIL NO.: VP2008-2802 to 2804 SUBJECT: Art. 5.01, 5.07 and 5.04 of the Weapons Act
THE PEOPLE OF PUERTO RICO PETITIONER v. JAIME GÓMEZ VÁZQUEZ RESPONDENT	KLCE201201325	CERTIORARI Originating in the Court of First Instance, Carolina Part CIVIL NO.: VP2008-2805 to 2807 SUBJECT: Art. 5.01, 5.07 and 5.10 of the Weapons Act
THE PEOPLE OF PUERTO RICO PETITIONER v. RENÉ RIVERO BETANCOURT BETANCOURT	KLCE201201326	CERTIORARI Originating in the Court of First Instance, Carolina Part CIVIL NO.: VP2008-2808 to 2811 SUBJECT: Art. 5.01, 5.07 and 5.10 of the Weapons Act
THE PEOPLE OF PUERTO RICO PETITIONER v. RENÉ RIVERO BETANCOURT RESPONDENT	KLCE201201426	CERTIORARI Originating in the Court of First Instance Carolina Part CIVIL NO.: VP2008-2793 to 2801 SUBJECT: Art. 5.01 (2 counts) and 5.04 of the Weapons Act

Panel comprised by its president, Judge González Vargas, Judge Carlos Cabrera and Judge Medina Monteserín.

CONCURRING VOTE

In San Juan, Puerto Rico, on December 19, 2012.

I acknowledge that the rule established by the Puerto Rico Supreme Court in *Pueblo v. Castro García,* 120 P.R. Dec. 740 (1988), prevails at this time in our jurisdiction. Therefore, I concur with the result reached by the panel. However, I respectfully believe that at present, there is room to review and discuss said caselaw. It is my opinion that twenty-four (24) years after the resolution of the referenced case, the legal grounds outlined by the Hon. Rebollo López in his dissenting opinion, which in the dusk of the year 2012 gain even more strength, serve as basis for a new evaluation of the legal doctrine known as "dual sovereignty" and its application to Puerto Rico, as an unincorporated territory of the United States of America.

[signed]
Hon. Teresa Medina Monteserín
Judge of the Court of Appeals

[CERTIFIED TRANSLATION]

Commonwealth of Puerto Rico
COURT OF APPEALS
CAROLINA AND SAN JUAN JUDICIAL REGION
PANEL VIII

THE PEOPLE OF PUERTO RICO Petitioner v. LUIS M. SÁNCHEZ VALLE Respondent		**APPEAL** Originating in the Court of First Instance, Carolina Part Case No.: VP-2008-2802 TO 2804 **SUBJECT:** Art. 5.01 (2 counts) and 5.04 of the Weapons Act
THE PEOPLE OF PUERTO RICO Petitioner v. JAIME GÓMEZ VÁZQUEZ Respondent	KLCE20121325	**CERTIORARI** Originating in the Court of First Instance, Carolina Part Crim. Case No.: VP2008-2805 to 2807 Subject: Art. 5.01, 5.07 and 5.10 of the Weapons Act
THE PEOPLE OF PUERTO RICO Petitioner v. RENÉ RIVERO BETANCOURT Respondent	KLCE201201426	**CERTIORARI** Originating in the Court of First Instance, Carolina Part Crim.Case No.: VP2008-2808 to 2811 Subject: Art. 5.01, 5.07 and 5.10 of the Weapons Act
THE PEOPLE OF PUERTO RICO Petitioner v. RAFAEL A. DELGADO RODRÍGUEZ Respondent	KLCE201201426	**CERTIORARI** Originating in the Court of First Instance, Carolina Part Crim.Case No.: VP2008-2793 to 2801 Subject: Art. 5.01 (2 counts) and 5.04 of the Weapons Act

Panel comprised by its president, Judge González Vargas, Judge Carlos Cabrera and Judge Medina Monteserín.

PARTICULAR VOTE OF JUDGE TROADIO GONZALEZ VARGAS

In San Juan, Puerto Rico, on December 19, 2012.

Although I am satisfied with the legal analysis and the decision that we have issued today in the captioned consolidated cases, I would like to add and highlight a few additional considerations that I believe reinforce our decision.

First of all, it is important to recognize that the present legal controversy, though legitimate, is inevitably impacted or influenced by the omnipresent debate about the subject of the political status of Puerto Rico. It is easy to observe from the analysis and the grounds that are outlined in the cases being considered, that they are tinged with a particular vision of the nature of the political and legal relationships between Puerto Rico and the United States, which the CFI considers to be colonial and territorial, subject to the plenary and absolute powers of Congress, in accordance with Art. IV, Sec. 3 of the federal Constitution. Starting from that premise, the inescapable conclusion is that Puerto Rico's ultimate source of authority to adopt its laws and indict its citizens for their infractions emanates from Congress, which is also the source from which the legislative authority regarding the statutes breached is derived in the federal sphere. Hence the argument of double jeopardy when attempting to prosecute a citizen in both jurisdictions for the same events, as in the captioned case.

Nevertheless, to a jurist visualizing the political relationships between Puerto Rico and the United

States from another perspective, the result of said controversy is, of course, different. I am specifically referring to those who argue that through the political-constitutional process that was verified in Puerto Rico between the years 1950 and 1952 , which culminated with the approval by the People of their own Constitution, a degree of autonomy and sovereignty similar to that of the States of the Union was recognized to Puerto Rico. Therefore, its self-governance attributes emanate from that Constitution by virtue of its sovereignty and not of the territorial clause. It is evident, from this particular perspective, that there is no legal or constitutional provision that prevents the prosecution of a citizen by both jurisdictions for the commission of a crime arising from the same act or omission under the corresponding statutes of the two sovereigns.

Approaching this controversy from the above-stated point of view would lead us to conclude, by strict deductive logic, that the solution to the legal controversy brought forth in these cases will ultimately depend on the particular views of the judge regarding what he or she, as a jurist and a Puerto Rican, genuinely believes about the nature of the political relationships between Puerto Rico and the United States. We are taught in law school, and it is even somehow part of judicial ethics, that the judge must solve the controversy before him or her according to the applicable law, and not on the basis of his or her personal ideas or convictions. However, we must recognize that the legal analysis of this controversy is inevitably intertwined with, and

influenced by, the ideological debate surrounding the subject of the status [of Puerto Rico], for which reason we cannot realistically separate both matters completely. Hence, in the absence of an external judge, who would also ultimately and inevitably end up adhering to one of those views in the course of his or her decision-making process, we will have to reluctantly accept that this is one of those matters that, as many others in our Country, will remain tied to this century-old debate, which persists due to the lack of a clear consensus about what we are or what we aspire to be as a people.

With those considerations on the table, I adhere to the view that Puerto Rico possesses sovereign attributes that legitimize its prerogative to indict its citizens under the circumstances presented in these cases. Although I recognize that this is an intricate, delicate and extensive subject that will perhaps require a much lengthier discussion, I have deemed it convenient to summarize at this time my particular opinion on the matter, even if only ever so lightly.

I begin by pointing out that it is legitimately debatable on legal and political grounds that in our times, at the dawn of the XXI century, the United States, one of the most civilized and democratic nations in the planet, continues to submit another people to a barbaric colonial regime of complete subordination and control, subject to its plenary and absolute powers. Although in today's world barbaric acts that offend human conscience are being

committed, fortunately there are good arguments to maintain that that is not our situation.

Based on the recent developments in international law, mainly due to the treaties that gave life to the United Nations and to the recognition of the so-called *ius cogens*[1], the right to self-determination and to end colonialism, has been proclaimed as an unalienable right of every nation. Said practice was not only abolished by international law, but has also been considered a crime against humanity and, therefore, against international law. Said regime has clear points of tangency, although at a much larger scale, with human slavery, for which reason it provokes in the international community a similar repulsion and disapproval. Just as it is unacceptable and contrary to human dignity to be subjected to the will of another, it is likewise also unacceptable and contrary to human dignity for a people to be subordinated against their will to the power and authority of another nation. Therefore, if that were the nature of the political and legal relationships between Puerto Rico and the United States, we would be facing a scenario of international crime by the United States in violation of international law.

Nevertheless, the political relationships between these two peoples, as well as the events that led to

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[1] These are universal rules and principles in international law, such as the prohibition of genocide, torture, illegal child trafficking, slavery, and even the right to self-determination of every nation, among others.

the adoption of our Constitution, must be framed and understood in the context of the above-stated development of international law after the Second World War and the condemnation of colonialism. Precisely motivated by that new international order, and in accordance with the treaties that support it, in which the United States is a signatory and protagonist, said country, in dialogue with the leaders of the Island, agreed early in the 1950s to establish a political relationship based on self-determination and the consent of the Puerto Rican people. Said relationship would be clearly geared towards the end of the colonial status that characterized our prior relationships, pursuant to the Treaty of Paris and the organic acts of 1902 and 1916.

That process, which began with the enactment of Public Law 600 and other related statutes, is based on a degree of sovereignty, comparable to that of the States of the Union in the federal scheme, being recognized to Puerto Rico, by virtue of which the Island would adopt its own Constitution to rule over the matters of its internal government. Likewise, it would delegate on the United States a series of attributes compatible with the four pillars of the association between the two peoples, to wit: a common citizenship, defense, market and currency. This necessary delegation obviously implies the recognition of the power of the United States to regulate the referenced fields or matters in a way that is compatible with the federal model and the uniformity with which those matters must be ruled under said regimen.

This arrangement, therefore, is framed on the attributes of a pact, not only because it is textually provided thusly by Public Law 600, but also because it is compatible with the demands of international law, according to which the relationships between the two peoples was to be ordered. Evidence of this is found in United Nations Resolution 748 (VIII), whereby, at the request of the United States, and after informing said Entity of the new political regime adopted in the Island in relation to the United States, Puerto Rico was removed from the list of colonial territories and the United States were excused from continuing to submit reports on their decolonization process.[2] Despite the prolonged efforts by some sectors of the country to revert said status, the General Assembly has never done so.

Based on the above, the nature and the objectives of this decolonization process force us to conclude that the political and legal relationships between the two peoples, from the perspective of the United States, is governed by the clauses of the treaties of the federal Constitution, Art. II, Sec. 2 and Art. VI, and not by the territorial clause, as it is argued in the appealed cases. It is my opinion that in this historical moment, this last clause, after its active role in the colonial history of the United States for the past century, must be confined to the way it was

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[2] Reports that this representation was incorrect would constitute an accusation that the United States lied to the international community and makes a misrepresentation on this matter.

originally conceived by the fathers of the Constitution; that is, to rule on the manner of acquiring and managing the lands that belong to the United States. It must no longer be viewed as a source of authority of the United States Congress to control and manage other peoples or nations with absolute and plenary powers. In that sense, the United States Supreme Court would be remiss not to review the doctrine of the so-called insular cases, mainly that of *Downes v. Bidwell*, 182 U.S. 244 (1901), responsible for legalizing in the federal system the use of said clause as a source of colonial authority. Although those cases must be judged in light of their historical context, they were based on a racist and prejudiced view of the inhabitants of the acquired territories, that must be buried in the same cemetery where the American apartheid and the caselaw that supported it now lie, after the decision in *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954). It is time for American federal law to rise with the times regarding this matter and especially regarding the rules and principles of international law, which are also binding on the United States as the law of the Nation. (*See* Art. VI of the federal Constitution.)

Now, going back to the main theme, it is clear that the constitutional arrangement between Puerto Rico and the United States, anchored on the treaties clause, is not set in stone and is thus subject to new developments in the search for mutual conveniences for both peoples. The passing of time demands adjustments, changes and new proposals that satisfy not only the current needs and interests of both

parties, but also the new and current demands of the new international order. This includes not only the possibility of reviewing the current relationships, but also the possibility of making more radical proposals for change, such as annexation as a federal State and independence, in response to the aspirations of all of the sectors of the Country in their legitimate claims about the political future of Puerto Rico.

The above, however, does not contradict the scope of sovereignty recognized to Puerto Rico in the actions of Congress between the years 1950-52 and the consent expressed by the People of Puerto Rico in more than one ballot initiative in favor of that new regime and its Constitution. In these circumstances, it seems appropriate to me to highlight the term "recognition" of our sovereignty and to differentiate it from the act of ceding or transferring it. It is in keeping with the new developments in international law that any nation under the involuntary control of another, even if practically stripped of its ability to self-govern, does not lose the right to its sovereignty, which always lies in the people, even if its hands are tied or if it is limited by its subordinate status. Again, the situation is comparable to that of slavery. Given that, as proclaimed by the Declaration of Independence of the United States, all persons are born free and equal, that freedom, which is inherent to the human condition itself, is not lost merely because an individual is circumstantially subjected against his or her will to the will of another. People are free by nature, because they are born endowed with said freedom and because it is consubstantial with their own being, even if the exercise of said

freedom is limited by the illegal use of force or violence. The same can be said about nations. Inasmuch as any exercise of power by a nation over another is always an unlawful and illegal act, according to the current rules of international law, the subjugated nation does not lose its sovereignty nor can it be validly stripped of it by the controlling nation, as it would be null and void *ab initio* and, consequently, radically ineffective and inconsistent.

Hence that, despite the colonial status of Puerto Rico under the Spanish and American regimes during the first half of the past century and even when it was an act permitted according to the rules of the time[3], said status did not strip it of its immanent sovereignty, that is, of its inalienable and irrepressible right to self-governance, despite its colonial status and the limitations of said exercise that said regime represented. Consequently, for the reasons stated above regarding the evolution of international law, the provisions of the Treaty of Paris to the effect that the sovereignty of Puerto Rico lied in the United States Congress cannot be validated today. That colonial policy prevailing at the time lost its legitimacy as a valid exercise of power after its subsequent condemnation by the international order between the 1940s and 1960s. For such a regime to be in place today and to be exercised by any nation in the world, would imply a declaration of international crime by said nation in the style of those that commit genocide, torture,

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[3] As slavery once was.

international drug trafficking, illegal kidnapping and trafficking of children, and even slavery itself, all proclaimed to be crimes against humanity.

Hence the appropriate use of the word "recognition" regarding our sovereignty, which has always resided with the People of Puerto Rico, even if its exercise has been prevented or limited by virtue of the colonial regime prevailing in the past centuries. Said sovereignty resided with the People as an attribute inherent to its very existence, once the elements and conditions that led to its recognition as such were configured. These elements are a defined population, located in a demarcated territory, joined by a common history, culture and language, which distinguishes it from any other nation or community in the world.

Nobody can deny that since the XIX century at the least, all of these conditions were present in Puerto Rico, all of which have, with the passing of time, become consolidated, with the recognition, too, of the rest of the international community in the globalization scenario in which we live. This community identified those of us who occupy this Caribbean island as Puerto Ricans and, therefore, as a people, the People of Puerto Rico, unique and distinguishable from the rest of humanity. Denying this would imply the notion that we are but a "mess" of people, without an identity of our own, sharing a common space. That, however, is not our case.

So, with the birth of this nation, its sovereignty was also born, as an immanent, *sine qua non*, attribute of its very condition and nature. It

possesses said sovereignty since that very moment, of its own right, leaving no room, legally and politically, for its proposed cession or transfer, but only for the recognition of same. It is precisely said recognition that materialized with the events that took place between 1950 and 1952, which culminated in the present self-government regime.

On the other hand, we must keep in mind that the concept of sovereignty is not static or monolithic, but rather evolving like all human activity, including biological activities. Said concept does not have the same meaning today that it had in the colonial setting of the past centuries and, in fact, what it meant in the first decades of the past half century.

As an example, at this point in time, nobody can question that Great Britain, or the current economic giants that are Germany or France, all members of the European Union, are sovereign countries. This, even if a supra-national entity exercises sovereign attributes over them, such as regulating free traffic and the permanence of people and products in their national territory, the right of said "foreigners" to work in said countries under equal conditions as their nationals, including exploiting their natural resources, such as fishing in its territorial waters, imposing a monetary policy regarding a common currency, in summary, the obligation to observe their comprehensive regulations on matters that are clearly relevant to the exercise of their traditional sovereignty, as well as the decision of a supra-national court, the European Court, with relation to said matters, among many other prerogatives. This

is so because, by virtue of the treaties that serve as basis to the regime of the European Union, their member countries have delegated on that entity part of their sovereign attributes and have retained others. This is possible because sovereignty, as we already mentioned, is not monolithic and indivisible. Rather, it is dynamic, flexible and pragmatic in the context of the new international order. Sort of like an electron, which can be in more than one place at the same time, according to the new findings of Physics. It is in that dimension that we must also understand our exercise of sovereignty in conjunction with the People of the United States.

In the context of the close political and economic union of our two nations in the matters and fields that we share (common currency, market, defense and citizenship), there has been a necessary delegation by Puerto Rico of government and sovereignty attributes to the United States with respect to those matters. This in exchange for certain important benefits that said community of interests represents for the Island. Examples of these are the free movement of Puerto Ricans throughout the entire national territory of the United States, their right to work and live in any of the federal states under equal conditions as their other residents, the protection and defense, the free flow of products and merchandise, which at that time mainly represented an important tool of economic development, the transfer of federal funds to subsidize different government programs and benefits for its citizens. (It is reported that this last segment represents approximately 97% parity with

the states.) All of it with the recognition, too, of its fiscal autonomy, which allows the Island to plan its fiscal policy on the basis of its own needs and interests, without the limitation posed by the federal tax system, among other benefits. In other words, said delegation is for "free," or in exchange for nothing. Clearly, said relationship also entails, as in any arrangement of this nature, burdens and obligations for the People of Puerto Rico. That is what the *quid pro quo,* always implicit in arrangements or agreements of this type, is all about.

The daily debate of this subject in our Country usually includes the lack of political and participatory power of Puerto Ricans in federal politics as one of those burdens. At the same time, it is brought up as evidence of the colonial status of Puerto Rico and its lack of sovereignty. However, that is not necessarily the case. This interpretation actually responds to a mistaken conception of the nature of our political and legal relationship with the United States. Puerto Rico is not a State of the Union. It is, instead, a nation closely associated politically and economically with the United States, which by means of the present self-governance agreement, wanted to maintain its own identity and condition as a Nation and exercise its prerogatives as such in the scope allowed by said arrangement. Other than closely sharing the "common" areas with the United States, it did not aspire to participate under this model, nor did it have to do so, in the internal government of the United States through proportional representation or the vote by its

government officials. Hence that said prerogatives are not exercised on the Island, even though Puerto Ricans can, as American citizens, exercise them in the states. These are attributes that are actually necessary and that originate from an annexation model, in which Puerto Rico would be incorporated as a federal State and, therefore, would have the right and the duty to participate in equal footing with the other members of the internal government of the Nation.

Keep in mind that the exercise of powers and prerogatives of the United States over Puerto Rico takes place under a model of association—not of integration—in terms of the matters and fields of interest that both nations share under a *quid pro quo* scheme. Such arrangement is based on the consent of the Puerto Rican people, which is evidenced, not only through their votes during ballot initiatives, but in the peaceful cohabitation of the two nations under this model for the past decades.[4]

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[4] We take judicial notice of the fact that last November the People were consulted about their decision to remain under what was described as the "current territorial status" of the Island. The prevailing option was "no." Nevertheless, there is a heated discussion about the legitimacy of said ballot initiative for the purposes sought by at least one of our political parties. There also seems to be a controversy about its recognition by the other part of this debate, the United States. I understand that, at this time, that matter is part of the partisan debate rather than the judicial debate. Thus, I will abstain from analyzing its implications, if any, on the subject, in view of the situation described above. It is enough, however, to simply highlight the fact that to whoever denies that the present

However, as with any other free association model, it is always up to the People delegating the ultimate prerogative to promote modifications of said relationship, to completely withdraw said delegation with a model of independence, or even with one of full integration to the associated country, all of it based precisely on the reserve of sovereignty that it possesses. Furthermore, denying that Puerto Rico possesses said attribute of sovereignty would necessarily imply the lack of legal capacity of the Puerto Rican people to decide their political future. It is precisely on the basis of the recognition of the sovereignty of Puerto Rico that, for example, its right to decide to become annexed to the United States as a federal State is legitimized. If it did not possess said sovereignty, Puerto Ricans would lack the capacity to make such a drastic decision and to assume the serious obligations that emanate from said new integration regime. Like a disabled person, the country would not have the capacity to consent to it, or to become bound by it. In said scenario, it would be necessary, to validate said action, to transfer to Puerto Rico the sovereignty that allegedly resides in the United States, and once a sovereign, for it to opt for integration in the full enjoyment of its "legal capacity" to do so. Instead, recognizing the

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relationship is colonial and territorial, it brings up a base problem regarding the definition applied to the current status as a territorial one. Hence the referenced objection to the validity of the referendum, which was classified as misleading because of that. Obviously, it is not our place at this time to solve that debate.

sovereignty of said nation makes it possible to forgo that procedural and substantive hurdle in its claiming of this option, as well as, obviously, of the two other formulas: association and independence.

This state of law does not deny that said legal framework and the very nature of the relationships between Puerto Rico and the United States may generate a degree of confusion, even between the parties themselves and the people in general. This explains the different judicial decisions on this matter, some of which are clearly contradictory, and also the diverse opinions that are put forth in this Country regarding the legal and political nature of the relationships between Puerto Rico and the United States between jurists and commentators. This, in addition to the extensive federal regulation and presence in the affairs of the Island, which cast doubt and dilute the limits of the exercise of said authority.

It is precisely these and other manifestations of the exercise of federal authority that promote the belief in some sectors that said relationships have a territorial and colonial component. This belief cannot be necessarily classified as absurd and completely unfounded, regardless of the correct interpretations and explanations that could be raised in opposition. Without a shadow of a doubt, the current model of association of a small country with an economic and military powerhouse, such as the United States, generates particular challenges and difficulties in casting away from everyone's minds the most diffuse of doubts regarding the non-

existence of colonial elements or traces in said relationship. Note that, even in the context of the relationships between independent states with this and other powerhouses, they are often accused of interfering and intervening in the internal matters of said countries or, at the least, of markedly influencing their internal policies based on the financial assistance and other aids that they are offered. This is commonly known as neocolonialism, precisely because of the suspected presence of colonial elements in the framework of that relationship.

It is obvious that said suspicion will be greater in a scenario of political association. Hence, perhaps, given the stated reality, any legitimate association arrangement in Puerto Rico will never be completely free of said suspicion, even under independence, in a scenario of peaceful and close political relationships with the United States. The former, particularly given the American citizenship of most of its inhabitants, the large flow of Puerto Ricans between the two nations, due to the great number of Puerto Rican nationals that reside in the United States, and the probable transfer of federal funds, at least those that constitute acquired rights, among others.

In sum, it is a reality that cannot be avoided and that generates understandable confusion and doubt. Notwithstanding the above situation, and in fact, even under the premise that the current arrangement is an imperfect one in which imbalances in the above-referenced quid pro quo in favor of the United States and a corresponding

deficit against Puerto Rico can be identified, this does not deny the sovereign attributes of the people of Puerto Rico and the exercise of same in the decolonization process between the years 1950-52. In any case, that should further the efforts towards eliminating those imbalances as much as possible, as well as the doubts that the current model generates by means of an honest, open and inclusive dialogue between the two nations.

Hence the urgency for the political leaders of the Country to, in the context of said dialogue, based on the reserve of sovereignty that this nation possesses, address those doubts and uncertainties so that it is clear to both nations that their political and legal relationships are in keeping with the international order and are free of any colonial traces or elements, as was aspired in the events that led to the adoption of our current regime. Said dialogue must, of course, be open, as we have already stated, to all of the options to which this nation can legitimately aspire, among them: annexation, independence and, of course, a renegotiation and clarification of the current relationship of association under the Commonwealth model, seeking that said model be adjusted to its current needs and to the realities of a global economy, as proposed by those who promote it. This, of course, in a process that satisfies the demands of fair play and equal footing for all parties, and that has the recognition of both parties and of international law as a legitimate mode of expressing the will and consent of the People.

Based on the foregoing, among other considerations that due to a lack of time and to the nature of this document we will omit, Puerto Rico possesses sovereign attributes of its own right, essentially similar to those exercised by the States of the Union in the context of their corresponding relationships with the federal government, although in a different aspect. As a sovereign, Puerto Rico has the prerogative and authority to adopt its own criminal laws and to prosecute their offenders, regardless of whether said offenders are or have been also prosecuted for the same events by the federal authorities for violating its own statutes. As we pointed out, said legislative and judicial authority does not emanate from a mere delegation of duties or tasks under a colonial or territorial scheme, but rather from the authority of the People to organize their internal affairs based on their reserve of sovereignty over them in the relationship of association that they maintain with the United States. Said authority emanates, above all, from the People of Puerto Rico through their Constitution, which was democratically adopted as the ultimate expression of their will in the exercise of their self-government attributes.

It is legally unacceptable and contrary to the dignity of every Puerto Rican to argue that even the adoption of their criminal laws and the indictment for the violation of same are merely the result of gifts or graces by the People of the United States, as if we found ourselves in the times of the crudest colonial regime. We find it to be equally offensive to the dignity of the People of the United States to be

accused of such colonial brutality in the dawn of the XXI century, and of being and acting as an international felon in front of the community of nations, in which they care to be regarded as a leader of international morality.

Fortunately, that is not the case. Each law broken in these consolidated cases emanates from different sovereigns, both in their respective scopes of authority, without it violating in any way the right of the defendants to not be prosecuted for the same offense.

Finally, at a time when this Country is harassed and crestfallen by the wave of crime that is covering it, it is incomprehensible to limit the most basic tool that a politically organized community has to protect itself, which is the authority to prosecute crime and process those who break its laws and the social order. Every legal and constitutional tool must be available to stop this serious problem. The courts, far from tying the hands of government authority in this battle, must make viable its effectiveness, according to the postulates of the law and of the constitution.

Therefore, the dismissing decisions appealed herein must be reversed.

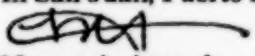
[signed]
Troadio González Vargas
Appellate Judge

[CERTIFIED TRANSLATION]

CERTIFICATE OF TRANSLATION INTO ENGLISH

I, Margot A. Acevedo, of legal age, married, a resident of Shorewood, WI., a professional interpreter/ translator, certified by the Administrative Office of the United States Courts, do HEREBY CERTIFY that I have personally translated the foregoing document and that it is a true and accurate translation to the best of my knowledge and abilities.

In San Juan, Puerto Rico, today, June 29, 2015.



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[CERTIFIED TRANSLATION]

COMMONWEALTH OF PUERTO RICO
COURT OF FIRST INSTANCE
SUPERIOR COURT
CAROLINA PART

THE PEOPLE OF PUERTO RICO **vs.** **LUIS M. SÁNCHEZ VALLE** **A/K/A LUIS** **A/K/A PEPO**	**VP. NO.: 2008-2802 TO 2804** **COURT ROOM: 104** **SUBJECT: ART. 5.01 W.A.** **ART. 5.04 W.A.**

DECISION

On September 26, 2008, several complaints were filed against Mr. Luis M. Sánchez Valle, A/K/A Luis, A/K/A Pepo, for events that took place on August 22, 2008, in violation of Articles 5.01 and 5.04 of the Puerto Rico Weapons Act, as amended.

It was alleged in said complaint that Mr. Luis M. Sánchez Valle illegally, voluntarily, maliciously, knowingly and with criminal intent, and in concert and mutual agreement with Héctor E. Gómez Pastrana, carried, sold and transferred a black 9mm Caliber Detective Pistol with serial number 345064, and twenty-three (23) 9mm caliber ammunitions, without being legally authorized to do so. On that same date, probable cause was found in his absence and an order was issued for the defendant's arrest,

setting bail at a total of two hundred twenty-five thousand dollars ($225,000.00).

After multiple procedural steps, on June 15, 2010, the defendant's legal counsel filed a Motion to Dismiss the captioned charges. In said motion, they informed that on December 1, 2009, Mr. Luis M. Sánchez Valle had been sentenced in federal court to serve five (5) months in prison, five (5) months of house arrest, plus a period of three (3) years of supervised release, for the same events for which he is being processed in the local court. In this way they alleged that, pursuant to the provisions of Rule 64 (e) of the Rules of Criminal Procedure, the complaints had to be dismissed due to double jeopardy. The prosecution opposed said request for dismissal.

Said motion was accompanied by copies of the federal indictment in case No. 09-CR-254-02 (FAB), as well as the plea bargain and the document ruling on it, issued by Hon. Francisco Besosa, federal Judge.

The defendant pled guilty and was convicted upon admitting charge four of the indictment, which has to do with selling and transferring a black 9mm Caliber Detective Pistol with serial number 345064, and twenty-three (23) 9mm caliber munitions without being legally authorized to do so.

The defense indicated in said motion that the sentence imposed in federal court on Luis M. Sánchez Valle is for the same events, which took place on the same date and involved the same

defendants and the same offenses as the case at hand.

They pointed out that the Commonwealth of Puerto Rico is not, and has never been, a sovereign State, and therefore the doctrine of "dual judicial sovereignty" does not apply to it. They stated that the cases in which said doctrine has been applied have involved the States of the Union and Native American tribes. They indicated that in both situations it has been affirmed that said States and tribes had an original or "primeval" sovereignty separate from that of the Federal Government. They thus concluded that the prosecution of the defendant constituted double jeopardy, inasmuch as he had been convicted and sentenced to prison in federal court for the same events, on the same date, involving the same rifle with the mutilated serial number, the same charger with the same ammunition, and for the same offense for which there is an attempt to prosecute him in the captioned case.

On June 23, 2010, the prosecution filed its **MOTION IN COMPLIANCE WITH ORDER INFORMING AND STATING THE POSITION OF THE PROSECUTION.** In it, the prosecution indicated, in summary, that the doctrine of "dual judicial sovereignty" is the basis for the inapplicability of the protection against double jeopardy in inter-jurisdictional cases. It pointed out that the federal government and the Commonwealth of Puerto Rico have separate sovereignties for purposes of the application of the doctrine of "dual

judicial sovereignty." It argued that said doctrine has been reiterated and upheld by the U.S. Supreme Court, which has refused to abolish it. It argued that the requirements for the applicability of the constitutional doctrine against double jeopardy are not present in this case and that, pursuant to said doctrine, the clause against double jeopardy does not prevent both the local court and the federal court from prosecuting the defendant for offenses arising from the same act or course of conduct.

After examining the arguments of the parties, the laws currently in force and effect and the entire case file, we believe that the defendant is right.

I. FACTUAL AND CONSTITUTIONAL BACKGROUND

The word "sovereignty" is derived from the Latin "Superans," which means "predominant," or "predominating or prevailing over," and comes to us through its homologous expression in French: "Souverain." In its primary sense, it is a concept derived from international law. A State is sovereign if it is independent from other states and possesses in and of itself, or has within itself, the authority to organize and rule over its internal affairs. The concept of sovereignty has also been defined as "a power and as a consensus; as the power of coordination needed for the organization and governance of the State."[1] Sovereignty, according to

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[1] F Arraiza Navas, *Soberanía v. Soberanía Dual*, 25 Rev. Jur. U.I.P.R. No. 3 645 (1991).

certain authors, is the absolute and perpetual power of a republic.[2] The States, the existence of which posits public international law, are called independent or sovereign States. According to international practice, a State is considered sovereign as long as it has not been dissolved within another State or has become a member of a federal State.[3]

On the other hand, the term "autonomy" refers to independence of action over internal or domestic matters, while the external and defense-related matters are usually controlled by a central government. Autonomy and self-governance do not imply that a territory is fully independent and comparable to a sovereign State. In most cases, autonomous territories do not have international status and are not treated as States for purposes of public international law. The United States of America are a clear example of this. The member states of the North American federation possess autonomy with regard to the sovereignty of the federal government, which represents them as a collective whole in the international sphere.[4]

Its foundational document, the Constitution of the United States of America, recognizes the *state* sovereignty of its federated members over all matters not expressly delegated to the Federal Government

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[2] *Supra*.

[3] *Supra* at 645.

[4] *Supra*.

or legislated by Congress in order to allow the central government to exercise those delegated rights or powers.

It is a sovereignty (that of the states) that is original and inherent to the people themselves, who used to exercise it fully as a republic or as an independent territory at the time of establishing its link with other states. In that moment, they agreed to delegate on a central government some of their sovereign powers and attributes in order to promote the common good of its citizens and retain others, such as the jurisdiction or legitimate authority to declare or enact the laws or rule of law that will govern within their geographic demarcation. Never, of course, over matters, areas or aspects related to the powers already delegated to the central government.

In keeping with the above, the essential criterion to determine whether a political entity is or is not a sovereign for purposes of the doctrine of "dual judicial sovereignty," is the ultimate source from which said political entity derives its will. The existence or non-existence of "dual judicial sovereignty" between two political entities for purposes of foregoing the application of the doctrine of double jeopardy actually depends on whether the ultimate source from which said entities derive their

power to prosecute the accused are different or if, on the other hand, it is the same.[5]

The doctrine of "dual judicial sovereignty" is based on the caselaw of the U.S. Supreme Court when interpreting Article 1, Section 8 of the federal Constitution, which expressly establishes the powers of the federal government, and Section 19 of said Article, which expressly establishes certain limitations to the powers of the member States of the North American federation; as well as the Tenth Amendment of the federal Constitution, which states that the powers not delegated to the United States by the Constitution and that have not been prohibited by same to the States, will be reserved for the respective States or for the People.

Several sovereignties coexist within the federal system: that of the 50 States and that of the federal government. Additionally, there are municipal, territorial, tribal and *sui generis* governments.[6]

Regarding the existing relationship between the federal or central government and the States that make up the North American Union, the U.S. Supreme Court has determined that they are separate political communities and that both derive

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[5] *See* Dissenting Opinion of Judge Rebollo López, *Pueblo v. Castro García*, 120 P.R. Dec. 787 (1988).

[6] E. Chiesa Aponte, *Derecho Procesal Penal de Puerto Rico y Estados Unidos*, Colombia, Ed. Tercer Mundo Editores, 1992, at 425.

their power from different sources; that is, from their respective organic laws.

In order to understand the doctrine of "dual judicial sovereignty" we must first keep in mind that the federal States were original sovereigns before joining the Union and assigning part of the attributes of their sovereignty to the central government. The 1781 Articles of Confederation recognized full sovereign powers to the States. The role of the central government was extremely limited and its power was subordinate to the will of the States.

With the drafting of the Constitution of 1787 and its enactment in 1789, the States transferred part of their sovereignty to the recently-created federal government. Nevertheless, the essential source of sovereignty continued to be the State itself.[7]

For its part, the federal government obtained its authority from the originally sovereign states when they approved a constitution that created an executive branch, with specific powers, Article II [of the] Constitution of the U.S.; a parliament with equally detailed powers, Article I; and a judicial branch with jurisdiction limited by the Constitution itself and by the pertinent statutes, Article III [of the] Constitution of the U.S. All of the powers that were not transferred or assigned belong to the States or to the People.

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[7] Tenth Amendment to the Constitution of the U.S.A.

The relationships between the Government of the United States and its territories and between the States of the Union and its cities are completely different. Territories and cities are not sovereign entities. Cities are government entities subordinated to same in the exercise of their governmental functions.

Regarding the relationship between municipalities and the State, there is no room for talking about "dual sovereignty," since municipalities are creatures of the State. Therefore, the constitutional clause protects against multiple prosecutions (a municipal prosecution and a state prosecution) for the same offense. [8]

In *Waller v. Florida,*[9] the U.S. Supreme Court held that the state government and the municipal government are not different sovereigns under the doctrine of "dual judicial sovereignty" for purposes of the protection against double jeopardy in the Fifth Amendment.

Likewise, the criminal laws of a territory emanate from the same power as the federal laws, therefore there is no "dual sovereignty" in the context of the federal and the territorial governments; it has been thusly held by the Supreme Court in decisions such as *Grafton v. United States*, 206 U.S. 333 (1907) and

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[8] E. Chiesa Aponte, *Derecho Procesal Penal de Puerto Rico y Estados Unidos*, Colombia, Ed. Tercer Mundo Editores, 1992, at 429.

[9] 397 U.S. 387 (1970).

Puerto Rico v. Shell Co., 302 U.S. 253 (1937), faced with the reality that the legislative power of the territories emanates from Congress or the federal government.[10]

Professor Chiesa points out said fundamental criterion in his book *Derecho Procesal Penal de Puerto Rico y Estados Unidos*[11]:

> "the particular status of the Commonwealth raises passionate controversies regarding the applicability of the doctrine of dual sovereignty for purposes of the protection against double jeopardy, in the federal-insular context. Of course, when faced with a prosecution by another State, followed or preceded by a federal prosecution, the doctrine of dual sovereignty is applied. But when faced with a criminal prosecution under the laws of the Commonwealth, followed or preceded by a federal prosecution, the applicability of the doctrine of dual sovereignty will depend on the answer to the following question: [do] the criminal laws of the Commonwealth emanate from an

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[10] E. Chiesa Aponte, *Derecho Procesal Penal de Puerto Rico y Estados Unidos*, Colombia, Ed. Tercer Mundo Editores, 1992, at 429.

[11] *Supra* at 429.

> independent sovereignty or, ultimately, from the federal government? This question has not been addressed—and will probably not be addressed—by the U.S. Supreme Court."

In the particular case of our Island, it is a historical reality that Puerto Rico was one of the territories transferred to the United States by Spain with the 1898 Treaty of Paris when the Spanish-American War came to an end. By virtue of said Treaty, the Island ceased to be a Spanish territory and became a North American territory. The historical reality and trajectory of Puerto Rico is, therefore, very different than that of the other States of the Union and of its endemic indigenous tribes.

Regarding the indigenous tribes of the United States, during the colonial era, the relationships between them and the Europeans that then began to populate the continent were embodied in treaties.

The colonies established in the East Coast of what is now the United States executed treaties with the indigenous peoples while their rights over the territories that they occupied were recognized.

The treatment of the indigenous tribes as sovereign nations was a principle that was established *prior to* the country's independence, and the government of the United States inherited this policy. After the Declaration of Independence, the Continental Congress, through the Northwestern Ordinance of 1787, affirmed the ownership of the United States over territories that had not been part

of the original colonies, but also recognized the ownership right of the indigenous peoples over those lands, and established that only the federal government (not the local governments or private citizens) could negotiate treaties or acquire the lands of the indigenous tribes.

Contrary to the States of the Union and to the Native American tribes, Puerto Rico has never had an original and primeval sovereignty. It was colonized and later transferred to the United States by Spain, and it was on that original territorial and colonial status that its relationship with the North American nation was founded. Therefore, there is no room, in our case, to talk about original and primeval, or pre-federative, sovereignty, as in the case of the States.

To some authors, it is absurd to want to accommodate a doctrine such as this one to Puerto Rico, as if Puerto Rico shared the sovereignty that the federal government possesses over [the territory].[12]

Since such sovereignty has never existed at any point during its political and constitutional development, the adoption of the doctrine of dual judicial sovereignty with the purpose of denying a defendant the protection against double jeopardy in inter-jurisdictional criminal cases is clearly

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[12] F. Arraíza Navas, *Soberanía v. Soberanía Dual*, 25 Rev. Jur. U.I.P.R. No. 3 645 (1991).

inapplicable and legally inconsistent with our status as an unincorporated territory of the United States.

Both prior to and following the enactment of the Constitution of the Commonwealth of Puerto Rico, the U.S. Supreme Court has been clear in terms of its political and constitutional relationship with Puerto Rico, defining us as an **unincorporated territory**.

There is abundant caselaw whereby the U.S. Supreme Court has clearly established that Puerto Rico, even after the enactment of the Constitution of the Commonwealth in 1952, continues to be subject to the provisions of the Territorial Clause of the Constitution of the United States of America.

Nevertheless, in 1988, the Puerto Rico Supreme Court held, in *Pueblo v. Castro García,*[13] that the federal government and the Commonwealth are separate sovereigns for purposes of the application of the federal constitutional clause against double jeopardy; that is, it held that Puerto Rico is equivalent to a "State" for purposes of the doctrine of "dual judicial sovereignty." The corollary is that there is nothing that prevents a criminal prosecution under the criminal laws of the Commonwealth following a federal prosecution for the same conduct that resulted in a conviction. Associate Justice Rebollo López issued a dissenting opinion based on Puerto Rico not being a "sovereign," in the sense that "the ultimate source of the power to criminally

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[13] 120 P.R. Dec. 740 (1988).

prosecute an individual has been and continues to be the United States Congress, Article IV Section 3, Cl. 2." [14]

In that case of *Pueblo v. Castro García,*[15] the Superior Court had affirmed the defendant's allegation of double jeopardy.

Regarding said decision, in his book *Derecho Procesal Penal de Puerto Rico y Estados Unidos*[16], Professor Chiesa states that:

> "Castro is not the last word regarding the applicability of the doctrine of dual judicial sovereignty to Puerto Rico; under the Fifth Amendment, the federal courts can rule otherwise, that is, as stated in the dissenting opinion. Additionally, it is also not clear whether Castro has the scope to interpret the Commonwealth's constitutional clause against double jeopardy and the barring of multiple prosecutions in Article 63 of the Penal Code, to deny protection in cases involving inter-jurisdictional (federal-state) prosecutions. On one hand, it

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[14] *See* Dissenting Opinion in *Pueblo v. Castro García*, 120 P.R. Dec. 740 (1988).

[15] 120 P.R. Dec. 740 (1988).

[16] E. Chiesa Aponte, *Derecho Procesal Penal de Puerto Rico y Estados Unidos*, Colombia, Ed. Tercer Mundo Editores, 1992, at 430.

> can be said that what the Supreme Court had before it was a constitutional matter involving double jeopardy, basis of the appealed decision, and not a statutory matter under Article 63 of the Penal Code. On the other hand, it can be said that what is being appealed is the sentence and not its grounds, for which reason Article 63 was implicitly rejected as basis to confirm the appealed decision."

This Court considers that, due to historical reasons and reasons of political, social, judicial and constitutional reality, the doctrine of "dual judicial sovereignty" does not apply to the controversy at hand. We believe that sovereignty or the source of power of Puerto Rico to prosecute its citizens resides and emanates from the federal government through Congress. Therefore, it is evident that the complaints against Mr. Luis M. Sánchez Valle in this Court of Instance for the violation of Articles 5.01 and 5.04 of the Weapons Act, in relation to the same facts for which he has already been convicted in the Federal District Court for the District of Puerto Rico, constitute *res judicata* and breach the constitutional prohibition against double jeopardy contained in the Fifth Amendment of the Constitution of the United States, as well as Article II, Section II of our Constitution.

II. CONCLUSION

A. The judicial sovereignty of a State emanates from its national or primeval sovereignty, which made it a political entity that is independent and free to govern itself and its citizens, said sovereignty being recognized by the international community of its peers. The States of the Union had an original, primeval, pre-federative sovereignty at the time of delegating some of the powers and attributes of said sovereignty to the federal central government. Except for the areas specifically delegated to the central government, state sovereignty is not affected by national sovereignty. Thus, said sovereignty is the constitutional source of power to criminally prosecute their citizens in matters under their withheld state sovereignty. The central federal government has assumed, through congressional legislation, legislative jurisdiction to criminally prosecute citizens of the states, when said criminal activity is clearly located within the areas delegated by the states to the central sovereignty, such as would be criminal activity involving the postal service or fraud in interstate commerce. In some areas it is preemptive and in others it allows the State to criminally prosecute a citizen that resides or is originally from one of said states, even when he or she is being or has been prosecuted by the central federal government. This, because it recognizes in such cases the existence of a dual judicial

sovereignty emanating from an original, primeval, pre-federative sovereignty of said State, that it never fully abdicated and that never eroded, except in the areas that it consented to delegate to it. Puerto Rico was, until the end of the XIX Century, a possession, territory and colony of the Spanish monarchy. It never had, under said monarchical rule, a single second of national sovereignty, which resided politically in the Spanish crown. As a consequence of the Treaty of Paris when the Spanish-American War came to an end, it became a colony, a possession, a territory of the United States of America. From the time of said transfer to the American Government as part of the spoils of war until now, sovereignty over Puerto Rico is exercised by the United States Congress pursuant to the Territorial Clause of its Constitution. (U.S. Const., Art. IV, § 3, Cl. 2, P.R. Laws Ann. Vol. 1) The exercise of a congressional delegation of powers through legislation has allowed the territory of Puerto Rico to constitute itself legally and constitutionally as an "autonomous," yet not sovereign, entity as to its relationship to the United States of America.[17]

The Foraker Act and the Jones Act provided a legal and constitutional framework

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[17] (Foraker Act of 1900, 31 Stat. 77 and Law 600, 64 Stat. 314 (1950)).

to exercise certain delegated powers, emanating from the primeval sovereignty over the territory of Puerto Rico that resides and remains with the United States Congress. Affirming that Puerto Rico has a judicial sovereignty that is different and separate from that of the United States would be to affirm that Congress transferred to Puerto Rico *full sovereignty* over the territory, when it only really agreed to delegate some inherent powers to said sovereignty so that they would be exercised by Puerto Rico in the meantime, with the Island thus acquiring a high degree of autonomy to manage affairs that, until then, were regulated by the federal Congress which had absolute authority. In keeping with the foregoing, it cannot be concluded in any way that with the mere approval of an Insular Constitution (at the mercy of legislative action by Congress), Puerto Rico (which never had any degree of sovereignty throughout its historical trajectory), acquired a sovereignty similar to that of the States of the Union, which is the basis of their judicial sovereignty vis a vis the judicial sovereignty of the central federal government. This is the current political, legal and constitutional reality of the relationship between Puerto Rico and the United States of America. Regardless of what legal fiction may be formulated to state otherwise, no matter how many times it is enunciated or how well it may be disguised in

jurisprudence, it will never cease to exist in its chimerical setting and become a reality.

B. The constitutional clause against double jeopardy contains several protections. To wit, against:

1. Subsequent prosecution after acquittal for the same offense;
2. Subsequent prosecution after conviction for the same offense;
3. Subsequent prosecution after prior exposure for the same offense;
4. Multiple punishments for the same offense.

In this context, "offense" is a broader term than "crime." For purposes of double jeopardy, the "same offense" refers to the same conduct, in the sense of the same action or group of actions, charged in the different proceedings. The scope that determines what must be considered "a same offense," is defined by the U.S. Supreme Court in *Grady v. Corbin*.[18] In said case, the Court stated as follows:

> "We hold that the double jeopardy clause bars a subsequent prosecution if, to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which

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[18] 110 S. Ct. 2084 (1990).

> the defendant has already been prosecuted."[19]

The scope of the protection under the Fifth Amendment of the Constitution of the United States, as stated in *Grady, supra*; binds Puerto Rico in relation to the minimum content of said protection against double jeopardy. (Chiesa Aponte, *Derecho Procesal Penal de Puerto Rico y Estados Unidos*, Vol. II p. 259). The restrictive wording of the corresponding clause of the local constitution (because it refers to "the same offense") clashes with the ruling in *Grady, supra*, and must yield to its interpretation, having to recognize that the constitutional protection is against multiple prosecutions for *the same criminal conduct*. In the captioned case, charges were filed against the defendant in state court for several violations of the Weapons Act; for the possession, sale and transfer of firearms and ammunition. Simultaneously, charges were filed against him in federal court for the possession, sale and transfer of the same firearm and ammunition.

The events charged in both jurisdictions refer to the same date, time and place; to the same course of conduct; and to the same transferred weapon (with the same serial number). The plea bargain before the court included the elements of criminal intent, illegal transfer of firearms to third parties and the

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[19] *Id.* at 2087.

confiscation of the weapon and ammunition seized by the officers.

The captioned defendant was sentenced by the federal court and served a term of five (5) months in prison, five (5) months of house arrest, plus a period of three (3) years of supervised release for the offenses with which he was charged. The elements of the crime found in the federal court's judgment, to wit: criminal intent; possession and distribution of weapons and ammunition, all constitute the same action, group of actions, or course of conduct and/or are essential elements that make up the offense or offenses with which the defendant is being charged in state court. In light of the above, there arises a sort of collateral estoppel that prevents a new prosecution of those elements of the offense that have been previously adjudged.

Allowing a new prosecution of these events or course of criminal conduct would place the defendant in double jeopardy, subjecting him to answering to the State more than once for the same events, and, therefore, exposing him to multiple punishments for the same offense. Since Puerto Rico is not a jurisdiction with a judicial sovereignty of its own and different from the federal judicial sovereignty because the power of both to bring charges against their citizens emanates from the same source—the United States Congress—it is not permitted under the current rule of law for the defendant to be submitted to state prosecution for the same events that have already been adjudged by a Federal Court. Doing so would be equivalent to answering twice for

the same criminal conduct, before the same system, power or jurisdiction.

The Court is fully aware, when issuing this Decision, of the acute social problem that is criminal activity in Puerto Rico, and of its overwhelming effect on the peace and quality of life of the average citizen. Our decision must not be interpreted in any way as an attempt at softening or reducing the punishment imposed by our legal system on citizens charged with or convicted of crimes.

The Court believes in imposing the full severity and weight of the law on its transgressors, taking into account the seriousness of the offenses committed, the existence of a criminal pattern or habit, and the impact that the nature of the offense has on the social entity that we all comprise. But it also cannot cease to vindicate the right of all of the inhabitants of this Island, be they habitual offenders or upright and law-abiding citizens, who due to the peculiar political, legal and constitutional relationship of the territory of Puerto Rico with the United States, could be subjected to a double prosecution in different jurisdictions, for the same criminal events, in open violation of their most basic constitutional rights.

The law is not "glorified procedural mechanics," but rather "codified common sense." A humanist and evolutionist-consciousness approach to positive law, demands in our time that what is practical, what is sensible, what authentically responds to the demands of our current civilization, begins to remove some of the rigidity and stagnation from the law,

which is always called to be, with ever-increasing urgency, an effective instrument of justice.

In Carolina, Puerto Rico, on this day of June 26, 2012

ENTER AND NOTIFY.

[signed]
CESAR JUAN ALMODOVAR MARCHANY
SUPERIOR COURT JUDGE

[stamp: JUN 27 2012]
[stamp: CERTIFIED: MIRIAM ROSA MALDONADO
REGIONAL CLERK

[vertical stamp:
Carolina Prosecutor's Office
2012 NOV-7 PM 2:35]

BY: **María de L. Maldonado Pagan** *(initialed)*
Deputy Clerk of the Court

[round stamp:
Commonwealth of PR
General Court of Justice
Court of First Instance
Carolina Part]

CERTIFICATE OF TRANSLATION INTO ENGLISH

I, Margot A. Acevedo, of legal age, married, a resident of Shorewood, WI., a professional interpreter/ translator, certified by the Administrative Office of the United States Courts, do HEREBY CERTIFY that I have personally translated the foregoing document and that it is a true and accurate translation to the best of my knowledge and abilities.

In San Juan, Puerto Rico, today, June 22, 2015.

Margot A. Acevedo
ATABEX TRANSLATION SPECIALISTS, Inc.

[CERTIFIED TRANSLATION]

COMMONWEALTH OF PUERTO RICO
COURT OF FIRST INSTANCE
SUPERIOR COURT
CAROLINA PART

THE PEOPLE OF PUERTO RICO	**VP. NO.: 2008-2805 TO 2807**
vs.	**COURT ROOM: 104**
JAIME GÓMEZ VÁZQUEZ A/K/A PITO	**SUBJECT: ART. 5.01 W.A.** **ART. 5.07 W.A.** **ART. 5.10 W.A.**

DECISION

On September 28, 2008, several complaints were filed against Mr. Jaime Gómez Vázquez, A/K/A Pito, for events that took place on July 9, 2008, in violation of Articles 5.01, 5.07 and 5.10 of the Puerto Rico Weapons Act, as amended.

It was alleged in said complaint that Mr. Jaime Gómez Vázquez illegally, voluntarily, maliciously, knowingly and with criminal intent, and in concert and mutual agreement with Rafael A. Delgado Rodríguez and Héctor E. Gómez Pastrana, carried, sold and transferred a black SKS Type 56 Carbine target rifle with a 20 1/2 inch barrel and a mutilated serial number, without being authorized to do so. On that same date, probable cause was found in his absence and an order was issued for the defendant's arrest, setting bail at a total of three hundred twenty-five thousand dollars ($325,000.00).

After multiple procedural steps, on August 27, 2010, the defendant's legal counsel filed a Motion to Dismiss the captioned charges. In said motion, they informed that on June 25, 2010, Mr. Jaime Gómez Vázquez had been sentenced in federal court to serve 18 months in prison, plus a period of three (3) years of supervised release, for the same events for which he is being processed in the local court. They alleged that, pursuant to the provisions of Rule 64 (e) of the Rules of Criminal Procedure, the complaints had to be dismissed due to double jeopardy. The prosecution opposed said request for dismissal.

Said motion was accompanied by copies of the federal indictment in case No. CR-09-253-04 (DRD), the plea bargain and the document ruling on it, issued by Hon. Daniel R. Dominguez, federal Judge.

The defendant pled guilty and was convicted upon admitting charges one and five of the indictment, which have to do with conspiring to sell and transfer, and subsequently selling and transferring a black SKS target rifle, model Carbine Type 56, 20 1/2 inch barrel, with a mutilated serial number.

The defense indicated in said motion that the sentence imposed in federal court on Jaime Gómez Vázquez is for the same events, which took place on the same date and involved the same defendants and the same offenses as the case at hand.

They pointed out that the Commonwealth of Puerto Rico is not, and has never been, a sovereign State, and therefore the doctrine of "dual judicial sovereignty" does not apply to it. They stated that the cases in which said doctrine has been applied

have involved the States of the Union and its Native American tribes. They indicated that in both situations it has been affirmed that said States and tribes had an original or "primeval" sovereignty separate from that of the Federal Government. They thus concluded that the prosecution of the defendant constituted double jeopardy, inasmuch as he had been convicted and sentenced to prison in federal court for the same events, on the same date, involving the same rifle with the mutilated serial number, the same charger with the same ammunition, and for the same offense for which there is an attempt to prosecute him in the captioned case.

On October 21, 2010, the prosecution filed its **MOTION IN COMPLIANCE WITH ORDER INFORMING AND STATING THE POSITION OF THE PROSECUTION**. In it, the prosecution indicated, in short, that the doctrine of "dual judicial sovereignty" is the basis for the inapplicability of the protection against double jeopardy in inter-jurisdictional cases. It pointed out that the federal government and the Commonwealth of Puerto Rico have separate sovereignties for purposes of the application of the doctrine of "dual judicial sovereignty." It argued that said doctrine has been reiterated and upheld by the U.S. Supreme Court, which has refused to abolish it. It argued that the requirements for the applicability of the constitutional doctrine against double jeopardy are not present in this case and that, pursuant to said doctrine, the clause against double jeopardy does not prevent both the local court and the federal court

from prosecuting the defendant for offenses arising from the same act or course of conduct.

After examining the arguments of the parties, the laws currently in force and effect, and the entire case file, we believe that the defendant is right.

I. FACTUAL AND CONSTITUTIONAL BACKGROUND

The word "sovereignty" is derived from the Latin "Superans," which means "predominant." or "predominating or prevailing over," and comes to us through its homologous expression in French: "Souverain." In its primary sense, it is a concept derived from international law. A State is sovereign if it is independent from other States and possesses in and of itself, or has within itself, the authority to organize and rule over its internal affairs. The concept of sovereignty has also been defined as "a power and as a consensus; as the power of coordination needed for the organization and governance of the State."[1] Sovereignty, according to certain authors, is the absolute and perpetual power of a republic.[2] The States, the existence of which posits public international law, are called independent or sovereign States. According to international practice, a State is considered sovereign as long as it has not been dissolved within

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[1] F. Arraiza Navas, *Soberanía v. Soberanía Dual*, 25 Rev. Jur. U.I.P.R. No. 3 645 (1991).

[2] *Supra.*

another State or has become a member of a federal State.[3]

On the other hand, the term "autonomy" refers to independence of action over internal or domestic matters, while the external and defense-related matters are usually controlled by a central government. Autonomy and self-governance do not imply that a territory is fully independent and comparable to a sovereign State. In most cases, autonomous territories do not have international status and are not treated as States for purposes of public international law. The United States of America are a clear example of this. The member States of the North American federation possess autonomy with regard to the sovereignty of the federal government, which represents them as a collective whole in the international sphere. [4]

Its foundational document, the Constitution of the United States of America, recognizes the *state* sovereignty of its federated members over all matters not expressly delegated to the federal government or legislated by Congress in order to allow the central government to exercise those delegated rights or powers.

It is a sovereignty (that of the States) that is original and inherent to the people themselves, who used to exercise it fully as a republic or as an independent territory at the time of establishing its

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[3] *Supra* at 645.

[4] *Supra*.

link with other States. In that moment, they agree to delegate on a central government some of their sovereign powers and attributes in order to promote the common good of its citizens and retain others, such as the jurisdiction or legitimate authority to declare or enact the laws or rule of law that will govern within their geographic demarcation. Never, of course, over matters, areas or aspects related to the powers already delegated to the central government.

In keeping with the above, the essential criterion to determine whether a political entity is or is not a sovereign for purposes of the doctrine of "dual judicial sovereignty," is the ultimate source from which said political entity derives its will. The existence or non-existence of "dual judicial sovereignty" between two political entities for purposes of foregoing the application of the doctrine of double jeopardy actually depends on whether the ultimate source from which said entities derive their power to prosecute the accused are different or if, on the other hand, it is the same.[5]

The doctrine of "dual judicial sovereignty" is based on the caselaw of the U.S. Supreme Court when interpreting Article 1, Section 8 of the federal Constitution, which expressly establishes the powers of the federal government, and Section 19 of said Article, which expressly establishes certain

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[5] *See* Dissenting Opinion of Judge Rebollo López, *Pueblo v. Castro García*, 120 P.R. Dec. 787 (1988).

limitations to the powers of the member States of the North American federation; as well as the Tenth Amendment of the federal Constitution, which states that the powers not delegated to the United States by the Constitution and that have not been prohibited by same to the States, will be reserved for the respective States or for the People.

Several sovereignties coexist within the federal system: that of the 50 States and that of the federal government. Additionally, there are municipal, territorial, tribal and *sui generis* governments.[6]

Regarding the existing relationship between the federal or central government and the States that make up the North American Union, the U.S. Supreme Court has determined that they are separate political communities and that both derive their power from different sources; that is, from their respective organic laws.

In order to understand the doctrine of "dual judicial sovereignty" we must first keep in mind that the federal States were original sovereigns before joining the Union and assigning part of the attributes of their sovereignty to the central government. The 1781 Articles of Confederation recognized full sovereign powers to the States. The role of the central government was extremely limited

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[6] E. Chiesa Aponte, *Derecho Procesal Penal de Puerto Rico y Estados Unidos*, Colombia, Ed. Tercer Mundo Editores, 1992, at 425.

and its power was subordinate to the will of the States.

With the drafting of the Constitution of 1787 and its enactment in 1789, the States transferred part of their sovereignty to the recently-created federal government. Nevertheless, the essential source of sovereignty continued to be the State itself.[7]

For its part, the federal government obtained its authority from the originally sovereign States when they approved a constitution that created an executive branch, with specific powers, Article II [of the] Constitution of the U.S.; a parliament with equally detailed powers, Article I; and a judicial branch with jurisdiction limited by the Constitution itself and by the pertinent statutes, Article III [of the] Constitution of the U.S. All of the powers that were not transferred or assigned belong to the States or to the People.

The relationships between the Government of the United States and its territories and between the States of the Union and its cities are completely different. Territories and cities are not sovereign entities. Cities are government entities subordinated to same in the exercise of their governmental functions.

Regarding the relationship between municipalities and the State, there is no room for talking about "dual sovereignty," since municipalities are creatures of the State. Therefore, the

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[7] Tenth Amendment to the Constitution of the U.S.A.

constitutional clause protects against multiple prosecutions (a municipal prosecution and a state prosecution) for the same offense.[8]

In *Waller v. Florida*[9], the U.S. Supreme Court held that the state government and the municipal government are not different sovereigns under the doctrine of "dual judicial sovereignty" for purposes of the protection against double jeopardy in the Fifth Amendment.

Likewise, the criminal laws of a territory emanate from the same power as the federal laws, therefore there is no "dual sovereignty" in the context of the federal and the territorial governments; it has been thusly held by the Supreme Court in decisions such as *Grafton v. United States*, 206 U.S. 333 (1907) and *Puerto Rico v. Shell Co.*, 302 U.S. 253 (1937), faced with the reality that the legislative power of the territories emanates from Congress or the federal government.[10]

Professor Chiesa points out said fundamental criterion in his book *Derecho Procesal Penal de Puerto Rico y Estados Unidos:*[11]

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[8] E. Chiesa Aponte, *Derecho Procesal Penal de Puerto Rico y Estados Unidos*, Colombia, Ed. Tercer Mundo Editores, 1992, at 429.

[9] 397 U.S. 387 (1970).

[10] E. Chiesa Aponte, *Derecho Procesal Penal de Puerto Rico y Estados Unidos*, Colombia, Ed. Tercer Mundo Editores, 1992, at 429.

[11] *Supra* at 429.

> "the particular status of the Commonwealth raises passionate controversies regarding the applicability of the doctrine of dual sovereignty for purposes of the protection against double jeopardy, in the federal-insular context. Of course, when faced with a prosecution by another State, followed or preceded by a federal prosecution, the doctrine of dual sovereignty is applied. But when faced with a criminal prosecution under the laws of the Commonwealth, followed or preceded by a federal prosecution, the applicability of the doctrine of dual sovereignty will depend on the answer to the following question: [do] the criminal laws of the Commonwealth emanate from an independent sovereignty or, ultimately, from the federal government? This question has not been addressed—and will probably not be addressed—by the U.S. Supreme Court."

In the particular case of our Island, it is a historical reality that Puerto Rico was one of the territories transferred to the United States by Spain with the 1898 Treaty of Paris when the Spanish-American War came to an end. By virtue of said Treaty, the Island ceased to be a Spanish territory and became a North American territory. The historical reality and trajectory of Puerto Rico is,

therefore, very different than that of the other States of the Union and of its endemic indigenous tribes.

Regarding the indigenous tribes of the United States, during the colonial era, the relationships between them and the Europeans that then began to populate the continent were embodied in treaties.

The colonies established in the East Coast of what is now the United States executed treaties with the indigenous peoples while their rights over the territories that they occupied were recognized.

The treatment of the indigenous tribes as sovereign nations was a principle that was established *prior to* the country's independence, and the government of the United States inherited this policy. After the Declaration of Independence, the Continental Congress, through the Northwestern Ordinance of 1787, affirmed the ownership of the United States over territories that had not been part of the original colonies, but also recognized the ownership right of the indigenous peoples over those lands, and established that only the federal government (not the local governments or private citizens) could negotiate treaties or acquire the lands of the indigenous tribes.

Contrary to the States of the Union and to the Native American tribes, Puerto Rico has never had an original and primeval sovereignty. It was colonized and later transferred to the United States by Spain, and it was on that original territorial and colonial status that its relationship with the North American nation was founded. Therefore, there is no room, in our case, to talk about original and

primeval, or pre-federative, sovereignty, as in the case of the States.

To some authors, it is absurd to want to accommodate a doctrine such as this one to Puerto Rico, as if Puerto Rico shared the sovereignty that the federal government possesses over [the territory].[12]

Since such sovereignty has never existed at any point during its political and constitutional development, the adoption of the doctrine of dual judicial sovereignty with the purpose of denying a defendant the protection against double jeopardy in inter-jurisdictional criminal cases is clearly inapplicable and legally inconsistent with our status as an unincorporated territory of the United States.

Both prior to and following the enactment of the Constitution of the Commonwealth of Puerto Rico, the U.S. Supreme Court has been clear in terms of its political and constitutional relationship with Puerto Rico, defining us as an **unincorporated territory**.

There is abundant caselaw whereby the U.S. Supreme Court has clearly established that Puerto Rico, even after the enactment of the Constitution of the Commonwealth in 1952, continues to be subject to the provisions of the Territorial Clause of the Constitution of the United States of America.

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[12] F. Arraíza Navas, *Soberanía v. Soberanía Dual*, 25 Rev. Jur. U.I.P.R. No. 3 645 (1991).

Nevertheless, in 1988, the Puerto Rico Supreme Court held, in *Pueblo v. Castro García,*[13] that the federal government and the Commonwealth are separate sovereigns for purposes of the application of the federal constitutional clause against double jeopardy; that is, it held that Puerto Rico is equivalent to a "State" for purposes of the doctrine of "dual judicial sovereignty." The corollary is that there is nothing that prevents a criminal prosecution under the criminal laws of the Commonwealth following a federal prosecution for the same conduct that resulted in a conviction. Associate Justice Rebollo López issued a dissenting opinion based on Puerto Rico not being a "sovereign," in the sense that "the ultimate source of the power to criminally prosecute an individual has been and continues to be the United States Congress, Article IV Section 3, Cl. 2."[14]

In that case of *Pueblo v. Castro García*[15], the Superior Court had affirmed the defendant's allegation of double jeopardy.

Regarding said decision, in his book *Derecho Procesal Penal de Puerto Rico y Estados Unidos*[16], Professor Chiesa states that:

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[13] 120 P.R. Dec. 740 (1988).

[14] *See* Dissenting Opinion in *Pueblo v. Castro García*, 120 P.R. Dec. 740 (1988).

[15] 120 P.R. Dec. 740 (1988).

"*Castro* is not the last word regarding the applicability of the doctrine of dual judicial sovereignty to Puerto Rico; under the Fifth Amendment, the federal courts can rule otherwise, that is, as stated in the dissenting opinion. Additionally, it is also not clear whether *Castro* has the scope to interpret the Commonwealth's constitutional clause against double jeopardy and the barring of multiple prosecutions in Article 63 of the Penal Code, to deny protection in cases involving inter-jurisdictional (federal-state) prosecutions. On one hand, it can be said that what the Supreme Court had before it was a constitutional matter involving double jeopardy, basis of the appealed decision, and not a statutory matter under Article 63 of the Penal Code. On the other hand, it can be said that what is being appealed is the sentence and not its grounds, for which reason Article 63 was implicitly rejected as basis to confirm the appealed decision."

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[16] E. Chiesa Aponte, *Derecho Procesal Penal de Puerto Rico y Estados Unidos*, Colombia, Ed. Tercer Mundo Editores, 1992, at 430.

This Court considers that, due to historical reasons and reasons of political, social, judicial and constitutional reality, the doctrine of "dual judicial sovereignty" does not apply to the controversy at hand. We believe that sovereignty or the source of power of Puerto Rico to prosecute its citizens resides and emanates from the federal government through Congress. Therefore, it is evident that the complaints against Mr. Jaime Gómez Vázquez in this Court of Instance for the violation of Articles 5.01, 5.07 and 5.10 of the Weapons Act, in relation to the same facts for which he has already been convicted in the U.S. District Court for the District of Puerto Rico, constitute res judicata and breach the constitutional prohibition against double jeopardy contained in the Fifth Amendment of the Constitution of the United States, as well as Article II, Section II of our Constitution.

II. CONCLUSION

A. The judicial sovereignty of a State emanates from its national or primeval sovereignty, which made it a political entity that is independent and free to govern itself and its citizens, said sovereignty being recognized by the international community of its peers. The States of the Union had an original, primeval, pre-federative sovereignty at the time of delegating some of the powers and attributes of said sovereignty to the federal central government. Except for the areas specifically delegated to the central government, state sovereignty is not affected by national

sovereignty. Thus, said sovereignty is the constitutional source of power to criminally prosecute their citizens in matters under their withheld state sovereignty. The central federal government has assumed, through congressional legislation, legislative jurisdiction to criminally prosecute citizens of the States, when said criminal activity is clearly located within the areas delegated by the States to the central sovereignty, such as would be criminal activity involving the postal service or fraud in interstate commerce. In some areas it is preemptive and in others it allows the State to criminally prosecute a citizen that resides or is originally from one of said states, even when he or she is being or has been prosecuted by the central federal government. This, because it recognizes in such cases the existence of a dual sovereignty emanating from an original, primeval, pre-federative sovereignty of said State, that it never fully abdicated and that never eroded, except in the areas that it consented to delegate to it. Puerto Rico was, until the end of the XIX Century, a possession, territory and colony of the Spanish monarchy. It never had, under said monarchical rule, a single second of national sovereignty, which resided politically in the Spanish crown. As a consequence of the Treaty of Paris when the Spanish-American War came to an end, it became a colony, a possession, a territory of the United States of America. From the time of said transfer to the

American Government as part of the spoils of war until now, sovereignty over Puerto Rico is exercised by the United States Congress pursuant to the Territorial Clause of its Constitution. (U.S. Const. Art. IV § 3, Cl. 2, P.R. Laws Ann. Vol. 1). The exercise of a congressional delegation of powers through legislation has allowed the territory of Puerto Rico to constitute itself legally and constitutionally as an "autonomous," yet not sovereign, entity as to its relationship to the United States of America.[17]

The Foraker Act and the Jones Act provided a legal and constitutional framework to exercise certain delegated powers, emanating from the primeval sovereignty over the territory of Puerto Rico that resides and remains with the United States Congress. Affirming that Puerto Rico has a judicial sovereignty that is different and separate from that of the United States would be to affirm that Congress transferred to Puerto Rico *full sovereignty* over the territory, when it only really agreed to delegate some inherent powers to said sovereignty so that they would be exercised by Puerto Rico in the meantime, with the Island thus acquiring a high degree of autonomy to manage affairs that, until then, were regulated by the federal Congress

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[17] (Foraker Act of 1900, 31 Stat. 77 and Law 600, 64 Stat. 314 (1950)).

which had absolute authority. In keeping with the foregoing, it cannot be concluded in any way that with the mere approval of an Insular Constitution (at the mercy of legislative action by Congress), Puerto Rico (which never had any degree of sovereignty throughout its historical trajectory), acquired a sovereignty similar to that of the States of the Union, which is the basis of their judicial sovereignty vis a vis the judicial sovereignty of the central federal government. This is the current political, legal and constitutional reality of the relationship between Puerto Rico and the United States of America. Regardless of what legal fiction may be formulated to state otherwise, no matter how many times it is enunciated or how well it may be disguised in jurisprudence, it will never cease to exist in its chimerical setting and become a reality.

B. The constitutional clause against double jeopardy contains several protections. To wit, against:

1. Subsequent prosecution after acquittal for the same offense;
2. Subsequent prosecution after conviction for the same offense;
3. Subsequent prosecution after prior exposure for the same offense;
4. Multiple punishments for the same offense.

In this context, "offense" is a broader term than "crime." For purposes of double jeopardy, the "same offense" refers to the same conduct, in the sense of the same action or group of actions, charged in the different proceedings. The scope that determines what must be considered "a same offense," is defined by the U.S. Supreme Court in *Grady v. Corbin*.[18] In said case, the Court stated as follows:

> "We hold that the double jeopardy clause, bars a subsequent prosecution if, to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted."[19]

The scope of the protection under the Fifth Amendment of the Constitution of the United States, as stated in *Grady, supra*; binds Puerto Rico in relation to the minimum content of said protection against double jeopardy. (Chiesa Aponte, *Derecho Procesal Penal de Puerto Rico y Estados Unidos*, Vol. II p. 259). The restrictive wording of the corresponding clause of the local constitution (because it refers to "the same offense") clashes with the ruling in *Grady, supra*, and must yield to its interpretation, having to recognize that the constitutional protection is against multiple

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[18] 110 S. Ct. 2084 (1990).

[19] *Id.* at 2087.

prosecutions for *the same criminal conduct*. In the captioned case, charges were filed against the defendant for several violations of the Weapons Act; for the sale of weapons; for possession and distribution of automatic weapons, and for the mutilation of the serial number of said weapons. Simultaneously, charges were filed against him in federal court for conspiracy to transfer and sell firearms with a mutilated serial number.

The events charged in both jurisdictions refer to the same date, time and place; to the same course of conduct; and to the same transferred weapon. It is important to point out that in the conspiracy charge, it was not charged in its initial or planning stage. The conspiracy had already ended in the crimes charged before, when charges were filed in the federal sphere. The plea bargain before the court included the element of conspiracy and the fact of having acted affirmatively to consummate it by means of the illegal transfer of weapons to third parties, and the confiscation of the weapon and ammunition seized by the officers.

The captioned defendant was sentenced by the federal court and served a term of eighteen (18) months in prison, plus a period of three (3) years of supervised release for the offenses with which he was charged. The elements of the crime found in the federal court's judgment, to wit: criminal intent; possession and distribution of automatic weapons with a mutilated serial number; conspiracy to carry out the acts described above, all constitute the same action, group of actions, or course of conduct and/or

are essential elements that make up the offense or offenses with which the defendant is being charged in state court. In light of the above, there arises a sort of collateral estoppel that prevents a new prosecution of those elements of the offense that have been previously adjudged.

Allowing a new prosecution of these events or course of criminal conduct would place the defendant in double jeopardy, subjecting him to answering to the State more than once for the same events, and, therefore, exposing him to multiple punishments for the same offense. Since Puerto Rico is not a jurisdiction with a judicial sovereignty of its own and different from the federal judicial sovereignty because the power of both to bring charges against their citizens emanates from the same source—the United States Congress—it is not permitted under the current rule of law for the defendant to be subjected to state prosecution for the same events that have already been decided by a federal court. Doing so would be equivalent to answering twice for the same criminal conduct, before the same system, power or jurisdiction.

The Court is fully aware, when issuing this Decision, of the acute social problem that is criminal activity in Puerto Rico, and of its overwhelming effect on the peace and quality of life of the average citizen. Our decision must not be interpreted in any way as an attempt at softening or reducing the punishment imposed by our legal system on citizens charged with or convicted of crimes.

The Court believes in imposing the full severity and weight of the law on its transgressors, taking into account the seriousness of the offenses committed, the existence of a criminal pattern or habit, and the impact that the nature of the offense has on the social entity that we all comprise. But it also cannot cease to vindicate the right of all of the inhabitants of this Island, be they habitual offenders or upright and law-abiding citizens, who due to the peculiar political, legal and constitutional relationship of the territory of Puerto Rico with the United States, could be subjected to a double prosecution in different jurisdictions, for the same criminal events, in open violation of their most basic constitutional rights.

The law is not "glorified procedural mechanics," but rather "codified common sense." A humanist and evolutionist-consciousness approach to positive law, demands in our time that what is practical, what is sensible, what authentically responds to the demands of our current civilization, begins to remove some of the rigidity and stagnation from the law, which is always called to be, with ever-increasing urgency, an effective instrument of justice.

In Carolina, Puerto Rico, on this day of June 26, 2012.

ENTER AND NOTIFY.

[signed]
CESAR JUAN ALMODOVAR MARCHANY
SUPERIOR COURT JUDGE

[stamp: JUN 28 2012]
[stamp: CERTIFIED: MIRIAM ROSA MALDONADO

[CERTIFIED TRANSLATION]

REGIONAL CLERK]

BY: **Maria de L. Maldonado Pagan** *[initialed]*

CERTIFICATE OF TRANSLATION INTO ENGLISH

I, Margot A. Acevedo, of legal age, married, a resident of Shorewood, WI., a professional interpreter/ translator, certified by the Administrative Office of the United States Courts, do HEREBY CERTIFY that I have personally translated the foregoing document and that it is a true and accurate translation to the best of my knowledge and abilities.

In San Juan, Puerto Rico, today, June 29, 2015.

Margot A. Acevedo
ATABEX TRANSLATION SPECIALISTS, Inc.
P.O. Box 195044, San Juan, PR 00919-5044

[Public Law 600] **[CHAPTER 446]**

AN ACT

To provide for the organization of a constitutional government by the people of Puerto Rico.

Whereas the Congress of the United States by a series of enactments has progressively recognized the right of self-government of the people of Puerto Rico; and

Whereas under the terms of these congressional enactments an increasingly large measure of self-government has been achieved: Therefore

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, fully recognizing the principle of government by consent, this Act is now adopted in the nature of a compact so that the people of Puerto Rico may organize a government pursuant to a constitution of their own adoption.

SEC. 2. This Act shall be submitted to the qualified voters of Puerto Rico for acceptance or rejection through an island-wide referendum to be held in accordance with the laws of Puerto Rico. Upon the approval of this Act, by a majority of the voters participating in such referendum, the Legislature of Puerto Rico is authorized to call a constitutional convention to draft a constitution for the said island of Puerto Rico. The said constitution shall provide a republican form of government and shall include a bill of rights.

SEC. 3. Upon adoption of the constitution by the people of Puerto Rico, the President of the United States is authorized to transmit such constitution to

the Congress of the United States if he finds that such constitution conforms with the applicable provisions of this Act and of the Constitution of the United States.

Upon approval by the Congress the constitution shall become effective in accordance with its terms.

SEC. 4. Except as provided in section 5 of this Act, the Act entitled "An Act to provide a civil government for Porto Rico, and for other purposes", approved March 2, 1917, as amended, is hereby continued in force and effect and may hereafter be cited as the "Puerto Rican Federal Relations Act"

SEC. 5. At such time as the constitution of Puerto Rico becomes effective, the following provisions of such Act of March 2, 1917, as amended, shall be deemed repealed:

(1) Section 2, except the paragraph added thereto by Public Law 362, Eightieth Congress, first session, approved August 5, 1947

(2) Sections 4, 12, 12a, 13, 14, 15, 16, 17, 18, 18a, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 39, 40, 49, 49b, 50, 51, 52, 53, 56, and 57.

(3) The last paragraph in section 37

(4) Section 38, except the second paragraph thereof which begins with the words "The Interstate Commerce Act" and ends with the words "shall not apply in Puerto Rico"

SEC. 6. All laws or parts of laws inconsistent with this Act are hereby repealed.

Approved July 3, 1950.

Public Law 447 CHAPTER 567

JOINT RESOLUTION

Approving the constitution of the Commonwealth of Puerto Rico which was adopted by the people of Puerto Rico on March 3, 1952.

Whereas the Act entitled "An Act to provide for the organization of a constitutional government by the people of Puerto Rico", approved July 3, 1950, was adopted by the Congress as a compact with the people of Puerto Rico, to become operative upon its approval by the people of Puerto Rico; and

Whereas the people of Puerto Rico overwhelmingly approved such Act in a referendum held on June 4, 1951, and a constitution for the Commonwealth of Puerto Rico was drafted by a constitutional convention held as provided by such Act from September 17, 1951, to February 6, 1952; and

Whereas such constitution was adopted by the people of Puerto Rico, by a vote of three hundred seventy-four thousand six hundred and forty-nine to eighty-two thousand nine hundred and twenty-three, in a referendum held on March 3, 1952; and

Whereas the President of the United States has declared that the constitution of the Commonwealth of Puerto Rico conforms fully with the applicable provisions of such Act of July 3, 1950, and of the Constitution of the United States, that it contains a bill of rights, and provides for a republican form of government, and has transmitted the constitution of

the Commonwealth of Puerto Rico to the Congress for its approval; and

Whereas the Congress has considered the constitution of the Commonwealth of Puerto Rico and has found it duly to conform to the above requirements: Therefore be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the constitution of the Commonwealth of Puerto Rico which was drafted by the selected delegates to the Constitutional Convention of Puerto Rico and adopted by the people of Puerto Rico in a referendum of March 3, 1952, in accordance with the Act entitled "An Act to provide for the organization of a constitutional government by the people of Puerto Rico", approved July 3, 1950 (64 Stat. 319; 48 U.S.C., secs. 731b-731e), is hereby approved by the Congress of the United States, except section 20 of article II of said constitution: *Provided*, That section 5 of article II thereof shall have no force and effect until amended by the people of Puerto Rico under the procedure prescribed by article VII of the constitution of the Commonwealth of Puerto Rico by adding to such section 5 the following declaration: "Compulsory attendance at elementary public schools to the extent permitted by the facilities of the state as herein provided shall not be construed as applicable to those who receive elementary education in schools established under nongovernmental auspices": *Provided further*, That except for the purpose of adopting the amendments to section 5 of article II and to section 3 of article VII as herein provided, article VII of said constitution

likewise shall have no force and effect until amended by the people of Puerto Rico under the terms of said article by adding to section 3 of article VII the following new sentence: "Any amendment or revision of this constitution shall be consistent with the resolution enacted by the Congress of the United States approving this constitution, with the applicable provisions of the Constitution of the United States, with the Puerto Rican Federal Relations Act, and with Public Law 600, Eighty-first Congress, adopted in the nature of a compact": *And provided further*, That the constitution of the Commonwealth of Puerto Rico hereby approved shall become effective when the Constitutional Convention of Puerto Rico shall have declared in a formal resolution its acceptance in the name of the people of Puerto Rico of the conditions of approval herein contained, and when the Governor of Puerto Rico, being duly notified by the proper officials of the Constitutional Convention of Puerto Rico that such resolution of acceptance has been formally adopted, shall issue a proclamation to that effect.

Approved July 3, 1952.

CONSTITUTION OF THE COMMONWEALTH OF PUERTO RICO

We, the people of Puerto Rico, in order to organize ourselves politically on a fully democratic basis, to promote the general welfare, and to secure for ourselves and our posterity the complete enjoyment of human rights, placing our trust in Almighty God, do ordain and establish this Constitution for the commonwealth which, in the exercise of our natural rights, we now create within our union with the United States of America.

In so doing, we declare:

The democratic system is fundamental to the life of the Puerto Rican community;

We understand that the democratic system of government is one in which the will of the people is the source of public power, the political order is subordinate to the rights of man, and the free participation of the citizen in collective decisions is assured;

We consider as determining factors in our life our citizenship of the United States of America and our aspiration continually to enrich our democratic heritage in the individual and collective enjoyment of its rights and privileges; our loyalty to the principles of the Federal Constitution; the co-existence in Puerto Rico of the two great cultures of the American Hemisphere; our fervor for education; our faith in justice; our devotion to the courageous, industrious, and peaceful way of life; our fidelity to individual human values above and beyond social position,

racial differences, and economic interests; and our hope for a better world based on these principles.

ARTICLE I
THE COMMONWEALTH

Section 1. The Commonwealth of Puerto Rico is hereby constituted. Its political power emanates from the people and shall be exercised in accordance with their will, within the terms of the compact agreed upon between the people of Puerto Rico and the United States of America.

Section 2. The government of the Commonwealth of Puerto Rico shall be republican in form and its legislative, judicial and executive branches as established by this Constitution shall be equally subordinate to the sovereignty of the people of Puerto Rico.

Section 3. The political authority of the Commonwealth of Puerto Rico shall extend to the Island of Puerto Rico and to the adjacent islands within its jurisdiction.

Section 4. The seat of the government shall be the city of San Juan.

ARTICLE II
BILL OF RIGHTS

* * *

Section 11. In all criminal prosecutions, the accused shall enjoy the right to have a speedy and public trial, to be informed of the nature and cause of the accusation and to have a copy thereof, to be confronted with the witnesses against him, to have assistance of counsel, and to be presumed innocent.

In all prosecutions for a felony the accused shall have the right of trial by an impartial jury composed of twelve residents of the district, who may render their verdict by a majority vote which in no case may be less than nine.

No person shall be compelled in any criminal case to be a witness against himself and the failure of the accused to testify may be neither taken into consideration nor commented upon against him.

No person shall be twice put in jeopardy of punishment for the same offense.

Before conviction every accused shall be entitled to be admitted to bail.

Incarceration prior to trial shall not exceed six months nor shall bail or fines be excessive. No person shall be imprisoned for debt.

* * *

ARTICLE III
THE LEGISLATURE

Section 1. The legislative power shall be vested in a Legislative Assembly, which shall consist of two houses, the Senate and the House of Representatives, whose members shall be elected by direct vote at each general election.

* * *

ARTICLE IV
THE EXECUTIVE

Section 1. The executive power shall be vested in a Governor, who shall be elected by direct vote in each general election.

* * *

ARTICLE V
THE JUDICIARY

Section 1. The judicial power of Puerto Rico shall be vested in a Supreme Court, and in such other courts as may be established by law.

* * *

Section 8. Judges shall be appointed by the Governor with the advice and consent of the Senate. Justices of the Supreme Court shall not assume office until after confirmation by the Senate and shall hold their offices during good behavior. The terms of office of the other judges shall be fixed by law and shall not be less than that fixed for the terms of office of a judge of the same or equivalent category existing when this Constitution takes effect. The other officials and employees of the courts shall be appointed in the manner provided by law.

* * *

ARTICLE VI
GENERAL PROVISIONS

* * *

Section 4. General elections shall be held every four years on the day of November determined by the Legislative Assembly. In said elections there shall be elected a Governor, the members of the Legislative Assembly, and the other officials whose election on that date is provided for by law.

Every person over eighteen years of age shall be entitled to vote if he fulfills the other conditions determined by law. No person shall be deprived of

the right to vote because he does not know how to read or write or does not own property.

All matters concerning the electoral process, registration of voters, political parties and candidates shall be determined by law.

Every popularly elected official shall be elected by direct vote and any candidate who receives more votes than any other candidate for the same office shall be declared elected.

* * *

Section 18. All criminal actions in the courts of the Commonwealth shall be conducted in the name and by the authority of "The People of Puerto Rico" until otherwise provided by law.

* * *

Done in Convention, at San Juan, Puerto Rico, on the sixth day of February, in the year of Our Lord one thousand nine hundred and fifty-two.

Supreme Court, U.S.
FILED
AUG 24 2015
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 15-108

IN THE
Supreme Court of the United States

COMMONWEALTH OF PUERTO RICO,
Petitioner,

v.

LUIS M. SÁNCHEZ VALLE AND
JAIME GÓMEZ VÁZQUEZ,
Respondents.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Puerto Rico

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Congress's 1950-1952 enactment of legislation delegating certain powers to Puerto Rican local authorities, but leaving undisturbed Puerto Rico's constitutional status as a "territory," overruled this Court's decision in *Puerto Rico v. Shell Co. (P.R.)*, 302 U.S. 253 (1937)?

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INTRODUCTION

For the second time in four years, Petitioner asks this Court to wade into the divisive debate over Puerto Rico's constitutional status in the United States. *See Puerto Rico v. United States*, 132 S. Ct. 2375 (2012) (denying review of petition contending that the Constitution grants Puerto Ricans the right to representation in Congress). The Court should decline the invitation. The question presented is of little practical significance to criminal justice in Puerto Rico, and Petitioner's proclamation of the "political implications" of the decision below, Pet. 1, is a basis for denying certiorari, not granting it.

Petitioner's lead argument for certiorari is that the decision below conflicts with *United States v. Lopez Andino*, 831 F.2d 1164 (1st Cir. 1987). But *Lopez Andino* is a decades-old, barely-reasoned opinion which may no longer be good law in light of the First Circuit's very recent decision in *Franklin California Tax-Free Trust v. Puerto Rico*, No. 15-1218, ___ F.3d ___, 2015 WL 4079422 (1st Cir. July 6, 2015). The Court should defer review until the First Circuit has the opportunity to clarify its precedent and consider the continuing viability of *Lopez Andino*.

Contrary to Petitioner's assertions, the decision below carries no practical consequences on Puerto Rican criminal justice justifying immediate review. A reversal by this Court will almost certainly result in the Puerto Rico Supreme Court reaching the identical result based on the Puerto Rico Constitution, leaving

the parties right back where they started. Yet, a decision by this Court could have complex and unpredictable effects both on political debate and on other litigation related to Puerto Rico's political status; indeed, a reversal of the judgment below might render the Puerto Rican taxation system unconstitutional. As a matter of prudence, the Court should stay its hand.

Finally, the decision below is correct. This Court has already held that because Puerto Rico is a "territory" of the United States, it is not a separate sovereign for double jeopardy purposes. *Puerto Rico v. Shell Co. (P.R.)*, 302 U.S. 253 (1937). Nothing material has changed. Congress's decision to delegate additional powers to Puerto Rico in the 1950s, while preserving Puerto Rico's constitutional status as a "territory," could not and did not overrule *Shell*. Because Petitioner has offered no persuasive basis for the Court to reconsider its precedent, the Petition should be denied.

STATEMENT OF THE CASE

A. Background

Previously a colony of Spain, Puerto Rico became a territory of the United States pursuant to the Treaty of Paris, which was formally ratified in 1899 after America won the Spanish-American War. The Treaty of Paris stated that Congress would determine "the civil rights and political status" of Puerto Ricans. Treaty of Paris, 30 Stat. 1754, art. IX (1899). Exercising its constitutional power to "make all needful Rules and Regulations respecting the Territor[ies]," U.S. Const.

art. IV, § 3, cl. 2, Congress has repeatedly delegated power to local Puerto Rican authorities—while reserving for itself ultimate authority over the structure of the Puerto Rican government.

Congress's first delegation of power to Puerto Rico was the Foraker Act in 1900, which established a government for Puerto Rico and allowed Puerto Ricans to popularly elect their own House of Delegates. *See* Organic Act of 1900, ch. 191, 31 Stat. 77. Over time, Congress granted Puerto Rico additional autonomy. In 1917, Congress passed the Jones Act, which created a popularly elected Puerto Rican Senate. *See* Organic Act of 1917, Pub. L. No. 64-368, ch. 145, 39 Stat. 951. In 1947, Congress enacted legislation permitting Puerto Ricans to popularly elect their own governor, who would appoint the heads of almost every executive department in Puerto Rico. *See* Act of Aug. 5, 1947, ch. 490, 61 Stat. 770. Accordingly, by 1948, Puerto Ricans were directly electing their own governor and both houses of their legislature.

In 1950, Congress enacted legislation authorizing the Puerto Rican people to establish a new territorial constitution, but retaining for itself the plenary authority to review the territorial constitution before it became effective. Act of July 3, 1950, Pub. L. No. 81-600, § 3, 64 Stat. 319. Although this legislation, known as Public Law 600, delegated additional powers to the Puerto Rican people, neither Congress, nor the executive, nor Puerto Rico itself intended it to work a change in the territorial status of Puerto Rico. The House and Senate Committee Reports both stated that

the law "would not change Puerto Rico's fundamental political, social and economic relationship to the United States." H.R. Rep. No. 81-2275 at 3 (1950); S. Rep. No. 81-1779 at 3 (1950). They also made clear that the law in no way "preclude[s] a future determination by the Congress of Puerto Rico's ultimate political status." H.R. Rep. No. 81-2275 at 3; *see also* S. Rep. No. 81-1779 at 4.

In the words of the United States Secretary of the Interior, who was the cabinet officer responsible for the administration of Puerto Rico, the "bill merely authorizes the people of Puerto Rico to adopt their own constitution and to organize a local government" and would "not change Puerto Rico's political, social, and economic relationship to the United States." *Puerto Rico Constitution: Hearings on HR 7674 and S. 3336 Before the House Comm. on Public Lands*, 81st Cong., 163, 164 (1949-1950) (letter from Secretary of the Interior Oscar. L. Chapman to Chairman Joseph C. O'Mahoney).

The Resident Commissioner of Puerto Rico, whom the people of Puerto Rico directly elected as their non-voting delegate to Congress, testified likewise: "H.R. 7674 would not change the status of the island of Puerto Rico relative to the United States. ... *It would not alter the powers of sovereignty acquired by the United States over Puerto Rico under the terms of the Treaty of Paris.*" *Id.* at 63 (statement of Antonio Fernós Isern) (emphasis added). The popularly elected governor of Puerto Rico, Luis Muñoz Marín, confirmed that "Congress can always get around and legislate again" if

Puerto Rico did not fare well under its own constitution. *Id.* at 33.

In accordance with Public Law 600, Puerto Rico called a convention to draft its preliminary constitution, which was ultimately approved by Puerto Rican voters in March 1952. *See* H.R. Rep. 82-1832 (1952). However, the territorial constitution would take effect only "[u]pon approval by the Congress" and by the President. Act of July 3, 1950, Pub. L. No. 81-600, § 3, 64 Stat. 319.

President Truman confirmed that the territorial constitution created a republican form of government and urged Congress to approve it. *See* H.R. Rep. 82-1832 at 8-10. When presented with the preliminary constitution, Congress unilaterally made three important changes: (1) Congress removed Section 20 of Article II, which had established a right to work, right to adequate standard of living, and social protection in old age or sickness; (2) Congress added a provision assuring continuation of private elementary schools; and (3) Congress added a provision requiring that any amendment be consistent with the federal Constitution, the Puerto Rican Federal Relations Act, and Public Law 600. *See* Joint Resolution, Pub. L. No. 82-447, 66 Stat. 327 (1952).

Congress then approved the modified territorial constitution—and again made clear that "*the approval of this constitution by the Congress will not change Puerto Rico's fundamental political, social, and economic relationship to the United States.*" H.R. Rep.

82-1832 at 7 (emphasis added); *see also* S. Rep. No. 82-1720 at 6-7 (1952). President Truman signed the Congressionally-modified constitution on July 3, 1952, and then Puerto Rico's constitutional convention approved the constitution on July 25, 1952. *See* José Trías Monge, *Puerto Rico: The Trials of the Oldest Colony in the World* 117-18 (1997).

B. Proceedings Below

Respondent Luis Sánchez Valle was indicted in Puerto Rico territorial court for (1) selling a firearm and ammunition without a permit, *see* 25 P.R. Laws Ann. § 458; and (2) illegally carrying a firearm, *see id.* § 458c. Pet. App. 2a. Based on the same facts, a federal grand jury indicted Sánchez Valle for the illegal trafficking of firearms and ammunition in interstate commerce, in violation of 18 U.S.C. §§ 922(a)(1)(A), 923(a), 924(a)(1)(D), 924(a)(2). Pet. App. 2a.

Sánchez Valle pleaded guilty in federal court and was sentenced to prison, followed by house arrest and supervised release. Pet App. 2a-3a. Upon Sánchez Valle's motion, the Puerto Rico territorial court dismissed all of his pending indictments, finding that the Double Jeopardy Clause forbade prosecution of the alleged violations of Puerto Rico territorial law after Sánchez Valle had been convicted in federal court. Pet. App. 3a.

Respondent Jaime Gómez Vázquez was indicted in Puerto Rico territorial court for (1) selling a firearm without a permit, *see* 25 P.R. Laws Ann. § 458; (2) illegally carrying a rifle, *see id.* § 458f; and (3)

transferring a mutilated weapon, *see id.* § 458i. Pet. App. 4a. Based on the same facts, a federal grand jury indicted Gómez Vázquez for the illegal trafficking of firearms in interstate commerce, in violation of 18 U.S.C. §§ 922(a)(1)(A), 923(a), 924(a)(1)(D). Pet. App. 4a.

Gómez Vázquez pleaded guilty in federal court and was sentenced to prison followed by supervised release. Pet. App. 5a. Upon Gómez Vázquez's motion, the Puerto Rico territorial court then dismissed all charges against him on double jeopardy grounds. Pet. App. 6a.

The prosecution filed appeals in both cases, which were consolidated at the Puerto Rico Court of Appeals. That court reversed and concluded that under binding Puerto Rico Supreme Court precedent, Puerto Rico and the United States were separate sovereigns, and thus there was no double jeopardy bar for any of Respondents' charges in territorial court. Pet. App. 6a; Pet. App. 281a.

As relevant here, the Puerto Rico Supreme Court reversed. Pet. App. 1a-69a. The court found that for each Respondent, the territorial charge of illegal sale of weapons and ammunition under 25 P.R. Laws Ann. § 458 was the same crime, for double jeopardy purposes, as the federal charge of trafficking firearms and ammunition in interstate commerce under 18 U.S.C. § 922(a)(1)(A), of which both respondents were convicted in federal court. The court then held that because Puerto Rico and the United States are the same sovereign, trying Respondents in territorial court

for the § 458 charges would violate the Double Jeopardy Clause. Thus, it reversed the Puerto Rico Court of Appeals insofar as it had authorized prosecution on those charges. Pet. App. 2a.[1]

The court carefully analyzed the "dual sovereignty" principle, which states that the double jeopardy clause of the Fifth Amendment does not prevent two separate sovereigns from prosecuting an individual for the same offense. Pet. App. 14a. To determine whether two government entities are the same sovereign, the court looked to the "ultimate source of the power under which the indictments were undertaken." Pet. App. 19a. Pursuant to this analysis, the U.S. Supreme Court has held that the federal government, states, and Indian tribes all constitute separate sovereigns. Pet. App. 15a-23a.

The court noted, however, that the federal government and its territories are *not* considered separate sovereigns, because "a territorial court and a federal court exercise the authority of the same sovereign: the United States." Pet. App. 23a. In support, the court cited *Puerto Rico v. Shell Co. (P.R.)*, 302 U.S. 253 (1937), where this Court held that Puerto Rico and the United States were the same sovereign for purposes of double jeopardy because Puerto Rico

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[1] The Puerto Rico Supreme Court affirmed the Court of Appeals' decision authorizing prosecution on the remaining charges against each Respondent, on the ground that those charges were different from the crimes charged in federal court, and thus posed no double jeopardy issue. Pet. App. 10a.

was constitutionally a territory, albeit one with a high level of autonomy and a state-like status. Pet. App. 25a.

The court held that *Shell* was still good law, even though Congress had allowed Puerto Rico to enact its own constitution in 1952. Pet. App. 41a-62a. The court canvassed the contemporary legislative history, which showed uniformity among the legislative and executive branches, as well as Puerto Rican officials themselves, for the proposition that the enactment of the Puerto Rican constitution did not change Puerto Rico's sovereign status. Pet. App. 41a-46a. The court also held that post-1952 decisions of the U.S. Supreme Court confirmed that the Puerto Rico constitution "did not represent a change in the fundamental basis of the constitutional relations between Puerto Rico and the United States." Pet. App. 46a-56a.

The court noted that there are cases where Puerto Rico has been treated *like* a state, Pet. App. 63a, but those cases were not relevant because "the analysis that must be performed to determine whether there are two different sovereigns under the constitutional double jeopardy clause is not whether the entity is similar to, acts like or has certain attributes of a true sovereign." Pet. App. 64a. Rather, the "fundamental question ... is whether the two entities derive their authority from the same ultimate source of power." *Id.* Given that "Puerto Rico's authority to prosecute individuals is derived from its delegation by [the] United States Congress and not by virtue of its own sovereignty," the court concluded that double jeopardy

barred Puerto Rico's attempts to prosecute Respondents for the same crimes to which they had been tried in federal court. Pet. App. 65a-69a.

Chief Justice Fiol Matta, joined by Justice Oronoz Rodríguez, concurred in the result. The concurrence would have held that the prosecutions were barred by the Puerto Rico constitution's prohibition of double jeopardy—rather than the federal Constitution's. Pet. App. 71a-72a. The concurrence concluded that for purposes of the federal Double Jeopardy Clause, Puerto Rico and the United States were separate sovereigns. Pet. App. 164a. However, the concurrence reasoned that the Puerto Rico constitution, which states that "the dignity of the human being is inviolable," focuses its double jeopardy analysis primarily on the *individual defendant*'s right against duplicative proceedings, as opposed to the federal constitution, which focuses primarily on the *sovereign's* right to prosecute. Pet. App. 180a (quotation marks omitted). Thus, the concurrence concluded that Puerto Rico's constitution forbids successive prosecutions, even when conducted by separate sovereigns. Pet. App. 190a.

Justice Rodríguez Rodríguez dissented and argued that the majority was exercising "political pressure to pursue their political ideologies," rather than following the law, which she felt required affirmance. Pet. App. 241a. The dissent contended that Puerto Rico and the United States are separate sovereigns because "Congress, in approving [the Puerto Rico] Constitution, *relinquished* its plenary powers regarding Puerto Rico

in what pertains to internal affairs." Pet. App. 230a (emphasis in original). Given the extensive authority delegated to Puerto Rico to manage its own legislative and executive branches, "it is indisputable that the Commonwealth, within the scope of its internal affairs, is a sovereign entity that must be considered as such for purposes of the dual sovereignty doctrine." Pet. App. 240a. The dissent did not separately address the issue under the Puerto Rico constitution.

REASONS TO DENY THE PETITION

I. This Case Does Not Warrant Review.

Petitioner's argument for certiorari is premised on an alleged conflict with *United States v. Lopez Andino*, 831 F.2d 1164 (1st Cir. 1987). But recent authority from the First Circuit casts serious doubt on the continuing viability of *Lopez Andino*, and the Court should defer review until the First Circuit has the opportunity to harmonize its discordant precedents. Moreover, even if a conflict exists, its practical effect is minimal and supplies no basis to inject this Court into the swirling political debates over Puerto Rico's constitutional status.

A. The Alleged Conflict With *Lopez Andino* Does Not Justify Review Because *Lopez Andino* May No Longer Be Good Law.

Petitioner purports to have identified "a circuit conflict about as stark as they come." Pet. 15. But that alleged conflict emerges from a muddled, perfunctory

analysis in a decades-old First Circuit case that may no longer be good law.

In *United States v. Lopez Andino*, 831 F.2d 1164 (1st Cir. 1987), a divided First Circuit panel held that the Double Jeopardy Clause permitted a defendant to be subject to successive prosecutions in Puerto Rico and federal court. *Id.* at 1168. In reaching this conclusion, the court quoted stray dicta from this Court's decisions in *Examining Board of Engineers, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 594 (1976) and *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 8 (1982), which observed that Puerto Rico was "autonomous" in contexts entirely unrelated to the Double Jeopardy Clause. It also cited its own prior decision in *United States v. Benmuhar*, 658 F.2d 14, 18 (1st Cir. 1981), which asserted without analysis that Puerto Rico was a "state" for double jeopardy purposes. Without further explanation, the *Lopez Andino* court concluded that Puerto Rico "is treated as a state" for purposes of the Double Jeopardy Clause. 831 F.2d at 1168.

Judge Torruella wrote separately to express his disagreement with the court's double jeopardy analysis, based on an exhaustive analysis of Puerto Rico's constitutional status that the majority ignored. *Id.* at 1172-77 (Torruella, J., concurring). As Judge Torruella pointed out, not only was the majority's analysis perfunctory, but it was also unnecessary: the offenses charged in Puerto Rico and federal court were distinct, making the Double Jeopardy Clause irrelevant. *Id.*

Subsequent developments in the First Circuit cast doubt on *Lopez Andino*'s continuing viability. First, in two seminal cases from the 2000s, the First Circuit rejected the argument that Puerto Rico should be treated the same as the several States. In *Igartúa-de la Rosa v. United States*, 417 F.3d 145, 152 (1st Cir. 2005) (en banc), the court held that Puerto Rican residents lacked the constitutional right to vote for President. Subsequently, in *Igartúa v. United States*, 626 F.3d 592, 594 (1st Cir. 2010), the court held that Puerto Rican residents could not vote for members of the House of Representatives. Although not formally inconsistent with *Lopez Andino*, these cases are difficult to reconcile with *Lopez Andino*'s reasoning that Puerto Rico "is treated as a state" for constitutional purposes. 831 F.2d at 1168.

Most recently, in *Franklin California Tax-Free Trust v. Puerto Rico*, No. 15-1218, ___ F.3d ___, 2015 WL 4079422 (1st Cir. July 6, 2015), the First Circuit appears to have created an intra-circuit conflict on Puerto Rico's sovereign status, making it unclear at best whether *Lopez Andino* remains good law.

Franklin addressed municipal bankruptcy law in Puerto Rico. As recounted by the First Circuit, federal bankruptcy law did not apply to municipal bankruptcies "for much of the nation's history," based on a concern that "[f]ederal intervention . . . might interfere with states' rights under the Tenth Amendment in controlling their own municipalities." *Id.* at *3. This Court struck down the first federal municipality bankruptcy statute on precisely this ground: "[T]he

view that the federal government, acting under the bankruptcy clause, may impose its will and impair state powers" is "*inconsistent with the idea of sovereignty.*" *Ashton v. Cameron Cnty. Water Improvement Dist. No. 1*, 298 U.S. 513, 531 (1936) (emphasis added). Subsequently, Congress enacted new legislation which permitted municipalities to declare bankruptcy only if specifically authorized under State law. *Franklin*, 2015 WL 4079422, at *3. The Supreme Court upheld the new legislation, holding that "[t]he statute is carefully drawn so as not to impinge upon the sovereignty of the State." *United States v. Bekins*, 304 U.S. 27, 51 (1938).

However, although Congress now allows States to authorize its municipalities to declare bankruptcy, it has expressly denied Puerto Rico the same privilege. *Franklin*, 2015 WL 4079422, at *1 (citing 11 U.S.C. §§ 101(52), 109(c)). Nonetheless, in 2014, Puerto Rico enacted a municipal bankruptcy law in an effort to address its current fiscal crisis. *Id.* The law was designed to allow Puerto Rican public utilities, which are "municipalities" under federal bankruptcy law, to restructure their debt. *Id.*

In *Franklin*, the First Circuit held that because federal bankruptcy law permits the states, but not Puerto Rico, to authorize municipal bankruptcies, Puerto Rico's municipal bankruptcy law was preempted. *Id.* The court rejected Puerto Rico's argument that preemption "constitute[s] an impermissible interference with a state's control over its municipalities," holding that *Ashton* did not apply to Puerto Rico because "Puerto Rico's powers are not

[those] reserved to the States but those specifically granted to it by Congress under its constitution." *Id.* at *14 (bracket in original) (quotation marks omitted).

Given *Ashton's* holding that an equivalent federal statute, as applied to the States, is "inconsistent with the idea of sovereignty," 209 U.S. at 531, the First Circuit decision upholding the statute as applied to Puerto Rico establishes that Puerto Rico is *not* a separate sovereign. This decision appears irreconcilable with *Lopez Andino*'s holding that Puerto Rico *is* a separate sovereign. And the First Circuit did not even try to reconcile the two cases. Instead, the court expressly relied on *Judge Torruella's* opinion from *Lopez Andino*, which argued that Puerto Rico is *not* a separate sovereign. *Franklin*, 2015 WL 4079422, at *14 (quoting *Lopez Andino*, 831 F.2d at 1172 (Torruella, J., concurring)). Thus, *Franklin* appears to have created an intra-circuit conflict on Puerto Rico's sovereign status.

Petitioner did not file a petition for rehearing en banc in *Franklin*, presumably so as not to jeopardize the circuit split it cites in this petition. In a future case, however, a criminal defendant facing successive prosecutions in Puerto Rico and federal court will have every incentive to litigate the double jeopardy issue fully, including filing a petition for rehearing en banc in the First Circuit.

There are strong reasons to believe that the en banc First Circuit would reconsider *Lopez Andino*. First, as noted above, the First Circuit's own modern

precedents are in serious tension with *Lopez Andino*. Second, since *Lopez Andino* was decided, two courts—the court below, and the Eleventh Circuit—have analyzed the issue in far more detail than in *Lopez Andino* and have concluded that Puerto Rico is not a separate sovereign for double jeopardy purposes. *See* Pet. App. 1a-69a (decision below); *United States v. Sánchez*, 992 F.2d 1143, 1153 (11th Cir. 1993) (holding that that "[d]espite passage of the Federal Relations Act and the Puerto Rican Constitution," "Puerto Rican courts continue to derive their authority to punish from the United States Congress"). This intervening authority creates a strong prospect that the First Circuit will reconsider and formally overrule *Lopez Andino*.

Moreover, the First Circuit will have an opportunity to weigh in on the continuing viability of *Lopez Andino* very soon. In *United States v. Mercado-Flores*, No. 14-cr-466, ___ F. Supp. 3d ___, 2015 WL 3764518 (D.P.R. June 4, 2015), the District Court held that 18 U.S.C. § 2421, which makes it a federal crime to transport any individual with the intent to engage in criminal sexual activity "in interstate or foreign commerce, or in any Territory or Possession of the United States," does not apply to a purely intrastate criminal act in Puerto Rico. 2015 WL 3764518 at *1 (quotation marks omitted). The District Court's decision expressly relied on *Lopez Andino*. *Id.* at *5. The court "acknowledged" the contrary views of Judge Torruella and of other courts, including the court below. *Id.* at *8 n.8. But it found that it "must adhere to ... First Circuit precedent." *Id.* at *8. The United

States has appealed the District Court's ruling, *see United States v. Mercado-Flores*, No. 15-1859 (1st Cir.), and the First Circuit will therefore soon clarify whether and to what extent *Lopez Andino* remains binding precedent.

The First Circuit should be afforded the opportunity to reconcile *Franklin* and *Lopez Andino*, and consider whether to adopt the reasoning in *Sánchez* and the case below. At this time, given the instability in the First Circuit's precedents, there is no conflict of authority warranting this Court's review.

B. A Grant Of Certiorari In This Case Would Have Limited Practical Significance To Puerto Rican Criminal Justice.

Petitioner argues that this Court's immediate review is necessary because of the alleged practical effects of the decision below on Puerto Rican criminal justice. Pet. 29-31. Petitioner's arguments are exaggerated and provide no basis for review.

First, if this Court were to reverse the decision below as Petitioner requests, the Court's decision would be unlikely to have any real-world impact on the ability of Puerto Rican authorities to bring criminal prosecutions. The case would be remanded to the Supreme Court of Puerto Rico, and on remand, that court would likely grant respondents the same relief under the Puerto Rico Constitution as this Court denied them under the Federal Constitution. In a concurring opinion below, two justices of the Puerto Rico Supreme Court rejected the majority's analysis of

the dual sovereignty exception under the Federal Constitution, but explained that the Puerto Rico Constitution, which is "broader" in scope, prohibits successive prosecutions in federal and Puerto Rico court. *See* P.R. Const. art. II, § 11; Pet. App. at 73a, 188-190a. The justices in the majority did not address that question, but given their vigorous vindication of respondents' right to protection against double jeopardy under the Federal Constitution, they would be hard pressed to deny respondents an equivalent protection under the broader provisions of the Puerto Rico Constitution. Thus, reversing the decision below would likely result in an effectively identical outcome to the current status quo: defendants could be subject to successive prosecutions if the first case were brought in a territorial court and the second in federal court, but not if the cases were brought in reverse order.

Even setting that prospect aside, Petitioner seriously overstates the practical significance of the decision as it stands. Petitioner maintains that it "leads to the anomalous and untenable result that an individual first prosecuted in federal court in Puerto Rico and then prosecuted in territorial court for the same offense can raise a successful federal double jeopardy objection, while a person first prosecuted in court in Puerto Rico cannot." Pet. 3; *see id.* at 30. But this result is neither anomalous nor untenable.

First, the result is hardly "anomalous," given that a substantially identical result obtains in many jurisdictions across the United States. For example, in New York, "not only is the 'dual sovereignties' doctrine

ignored, but double jeopardy protection is extended, generally, to offenses arising out of a common event." *People v. Abbamonte*, 371 N.E.2d 485, 488 (N.Y. 1977) (discussing CPL 40.20 (subd. 2)); *see also State v. Hogg*, 385 A.2d 844, 845-47 (N.H. 1978) (dual sovereignty exception does not apply in New Hampshire state court); *State v. LeCoure*, 491 P.2d 1228, 1230-31 (Mont. 1971) (same, in Montana); *Commonwealth v. Grazier*, 393 A.2d 335, 339 (Pa. 1978) (same, in Pennsylvania, as long as "the interests of the Commonwealth are sufficiently protected at the federal trial").

Nor is the result in this case "untenable." Petitioner's assertion that Puerto Rico has been "stripped . . . of control over its own criminal laws," Pet. 29, is a serious exaggeration. Few would say that New York, New Hampshire, Montana, and Pennsylvania lack "control over [their] own criminal laws" merely because of the absence of a dual-sovereignty exception to the double jeopardy clause in state court. *Id.* Nor has Petitioner pointed to any real-world practical problems that have arisen in any of those states as a result of the prohibition on successive prosecutions in state court.

In practice, if the U.S. Justice Department seeks to bring federal charges against a defendant based on conduct also barred by Puerto Rican law, Puerto Rican authorities can arrange with the Justice Department to bring its prosecution first, thereby avoiding the double jeopardy prohibition recognized in this case. And if the Justice Department insists on bringing its prosecution first, Puerto Rican authorities remain free to charge

the defendant with any offenses requiring proof of different elements under *Blockburger v. United States*, 284 U.S. 299, 304 (1932). Indeed, the Puerto Rico Supreme Court expressly reinstated multiple charges against both Respondents for such offenses. *See* Pet. App. 10a. The minor impact this case will have on the Puerto Rican justice system does not justify plenary review.

C. The Court Should Not Enter The Controversial Debate Over Puerto Rico's Status.

It is clear from the very first sentence of its petition that Petitioner views this case not as a dispute over the administration of criminal justice, but as a springboard to have this Court resolve the controversial political debate over the status of Puerto Rico. *See* Pet. 1 (describing this as "the most important case on the constitutional relationship between Puerto Rico and the United States since the establishment of the Commonwealth in 1952"). Although Petitioner is wrong that a decision by this Court will affect Puerto Rican criminal justice, it is right that a decision by this Court could be "important," in the sense of having significant effects both on Puerto Rican political discourse and on other Puerto Rican status litigation. That is perhaps the strongest reason to *deny* certiorari in this case. This Court has previously refused to intervene in Puerto Rican status litigation, as shown by its denial of certiorari in three petitions arising from the far more consequential *Igartúa* cases. *See Igartúa v. United States*, 132 S. Ct. 2376 (2012); *Puerto Rico v.*

United States, 132 S. Ct. 2375 (2012); *Igartúa de la Rosa v. United States*, 547 U.S. 1035 (2006). This Court should maintain that practice and stay its hand here, in light of the complex and unpredictable consequences of declaring, as Petitioner suggests, that Puerto Rico is a "sovereign."

As a recent Presidential Task Force on Puerto Rico concluded, "Puerto Rico's status has been discussed and debated as far back as the Treaty of Paris," and the issue "has dominated the politics and life of the Island for decades." Report by the President's Task Force on Puerto Rico's Status 19, 24 (2011), *available at* https://www.whitehouse.gov/sites/default/files/uploads/Puerto_Rico_Task_Force_Report.pdf ("President's Task Force on Puerto Rico"). Congress perennially introduces legislation on whether—and under what terms—Puerto Rico should become a state or independent nation, or remain a territory. *See, e.g.*, Puerto Rico Status Resolution Act, H.R. 2000, 113th Cong. (2013); Puerto Rico Democracy Act of 2010, H.R. 2499, 111th Cong. (2010); Puerto Rico Democracy Act of 2007, H.R. 900, 110th Cong. (2007). Moreover, since 1967, Puerto Ricans have engaged in three significant plebiscites designed to determine their own will, but those votes have only "demonstrated significant divisions within the Puerto Rican electorate," with the meaning of the results themselves often hotly debated. President's Task Force on Puerto Rico at 21. The topic permeates all aspects of life and politics in Puerto Rico.

A declaration by this Court that Puerto Rico is, or is not, a "sovereign," could have a profound and

destabilizing effect on the debate over Puerto Rico's status. Indeed, even the dissent in this very case accused the majority of issuing a politically motivated opinion designed to galvanize support on the status question. *See* Pet. App. 241a (Rodríguez Rodríguez, J., dissenting). And with surprising candor, the Petition emphasizes the "political implications" of the decision below as a basis for granting review. Pet. 1. In fact it is a basis for denial. Absent a cert-worthy legal question, the Court should not lend its voice to this fundamentally political debate.

Moreover, the Court's decision—depending on its reasoning—could have dramatic effects on other Puerto Rican status litigation. Most obviously, the Court's decision could affect the more consequential issue decided in *Franklin*: whether Congress may preempt Puerto Rico's effort to allow its public utilities to declare bankruptcy. Indeed, Petitioner may file a Petition for Certiorari shortly in *Franklin*, and if it does, it will doubtless ask the Court to hold *Franklin* pending resolution of this case. Thus, this case may well be a Trojan Horse for Petitioner to obtain review of the question in *Franklin*.

Even more consequentially, a decision by this Court finding Puerto Rico to be a "sovereign" might also render the Puerto Rican taxation regime unconstitutional. Puerto Ricans are exempted from most federal tax laws. *See* 48 U.S.C. § 734 (providing that, with certain exceptions, "the internal revenue laws" do not apply to Puerto Rico). Yet, the Tax Uniformity Clause requires that "all Duties, Imposts,

and Excises" imposed by Congress "shall be uniform throughout the United States." U.S. Const. art. I, § 8, cl. 1. The constitutional basis for Puerto Rico's distinct tax regime is *Downes v. Bidwell*, 182 U.S. 244 (1901), which held that the Tax Uniformity Clause does not apply to Puerto Rico. The Court justified this conclusion based on Congress's plenary power over Puerto Rico—the precise reasoning that led the Court to hold in *Shell* that the dual-sovereignty exception did not apply to Puerto Rico. *Downes*, 182 U.S. at 289-90 (White, J., concurring)[2] (noting that the "Constitution has undoubtedly conferred on Congress the right to create such municipal organizations as it may deem best for all the territories of the United States"). If, as Petitioner contends, *Shell* is no longer good law, then *Downes* might no longer be good law either, which would mean that the entire Puerto Rican taxation system would be upended. And if a court held that Congress suddenly had the constitutional obligation to impose federal tax obligations on Puerto Ricans, Congress would face tremendous pressure to extend more federal funds to Puerto Rico and to give Puerto Ricans the right to representation in Congress and the Electoral College.

Other significant consequences may follow from a reversal by this Court. For instance, it might lead the First Circuit to reconsider its prior, closely-divided decisions in the *Igartúa* cases concluding that Puerto

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[2] Justice White's concurrence has long been recognized as "the settled law of the court." *Balzac v. Porto Rico*, 258 U.S. 298, 305 (1922).

Ricans may not vote for President or for members of Congress. And it could result in the Puerto Rican government gaining new "sovereign" rights against the United States, *see, e.g.*, *New York v. United States*, 505 U.S. 144, 188 (1992) (holding the "residuary and inviolable sovereignty" of the States prohibited Congress from "compel[ling] the States to enact or administer a federal regulatory program"), jeopardizing the century-old legal regime that Congress has plenary power to regulate in Puerto Rico.

In the context of a relatively obscure criminal case, the Court should stay out of this hornet's nest. *See Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting) ("Frequently an issue of this sort will come before the Court clad, so to speak, in sheep's clothing: the potential of the asserted principle to effect important change in the equilibrium of power is not immediately evident, and must be discerned by a careful and perceptive analysis.").

D. The Decision Of The Puerto Rico Supreme Court Is Correct.

Review is unwarranted here for the additional reason that the decision below is plainly correct. Although the normative question of whether Puerto Rico *should* be a sovereign entity is difficult, the descriptive question of whether Puerto Rico currently *is* a sovereign entity is not. Puerto Rico is a Territory of the United States. Under the Constitution, States are sovereign, but Territories are not. For this straightforward reason, this Court held in 1937 that

Puerto Rico was not a separate sovereign from the United States for purposes of double jeopardy because they "exert all their powers under and by authority of the same government." *Shell*, 302 U.S. at 265. That decision was correct at the time and is still correct today.

1. Puerto Rico Is Not "Sovereign" Because There Is No Such Thing As A "Sovereign Territory."

Petitioner argues that Puerto Rico is a 'sovereign territory,' something less than a state but more than a territory. *See* Pet. 27. Such an entity has never existed in our Nation's history and is inimical to the structure of the Constitution.

The Constitution recognizes two—and only two—forms of subnational government: states and territories. *See* U.S. Const. art. IV, § 3, cl. 1 (states); *id.* cl. 2 (territories); *accord First Nat'l Bank v. Cnty. of Yankton*, 101 U.S. 129, 133 (1879) ("All territory within the jurisdiction of the United States not included in any State must necessarily be governed by or under the authority of Congress.").

States and territories have vastly different statuses under the Constitution. Congress possesses enumerated powers over states. *See United States v. Lopez*, 514 U.S. 549, 552 (1995) ("The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite") (quoting The Federalist No. 45, at 292-93

(James Madison) (C. Rossiter ed. 1961)). Moreover, even in the exercise of those powers, Congress may not interfere with state sovereignty. *See, e.g., Printz v. United States*, 521 U.S. 898, 918-19 (1997) (holding that states "retained 'a residuary and inviolable sovereignty'" under the Constitution (quoting The Federalist No. 39, at 245 (James Madison)). This is because the government of a state "does not derive its powers from the United States," *Grafton v. United States*, 206 U.S. 333, 354-55 (1907), but instead derives its force "from power originally belonging to the states, preserved to them by the Tenth Amendment," *United States v. Lanza*, 260 U.S. 377, 381-82 (1922).

Conversely, Congress has plenary authority over territories and their governments. *See* U.S. Const. art IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States ...."). As the Court held in *Downes v. Bidwell*, 182 U.S. 244 (1901), the "Constitution has undoubtedly conferred on Congress the right to create such municipal organizations as it may deem best for all the territories of the United States," and inherent in that grant is Congress's power "to deprive such territory of representative government if it considered just to do so, and to change such local governments at discretion." *Id.* at 289-90 (White, J., concurring).

Because Congress has plenary power over territories, a "territorial government is entirely the creation of Congress, 'and its judicial tribunals exert all their powers by authority of the United States.'"

United States v. Wheeler, 435 U.S. 313, 321 (1978) (quoting *Grafton*, 206 U.S. at 354). "Territory and Nation ... are not two separate sovereigns ... but one alone." *Id.* Accordingly, when "a territorial government enacts and enforces criminal laws to govern its inhabitants, it is not acting as an independent political community like a State, but as an agency of the federal government." *Id.* (quotation marks omitted).

These principles resolve this case. As Petitioner itself acknowledges, Pet. 27, and as this Court has squarely held, *Harris v. Rosario*, 446 U.S. 651, 651-52 (1980) (per curiam), Puerto Rico is a "territory" under the Constitution. Therefore, "a prosecution in a court of the United States is a bar to a subsequent prosecution in a territorial court, since both are arms of the same sovereign." *Waller v. Florida*, 397 U.S. 387, 393 (1970).

Resisting this argument, Petitioner attempts to analogize Puerto Rico to Indian tribes, which have been held to possess their own sovereignty for double jeopardy purposes. *See Wheeler*, 435 U.S. at 319. But this Court has made clear that this is because tribes have a sovereignty that pre-dates the Constitution and Congress itself. *Id.* at 322-23. Puerto Rico is not, and has never been, considered an Indian tribe; nor can it claim any right to sovereignty predating the Constitution, given that the island was formally acquired from Spain in 1899.

Indeed, this Court has already resolved the question presented here. In *Puerto Rico v. Shell Co. (P.R.)*, 302 U.S. 253 (1937), this Court held Puerto Rico and the United States were the same sovereign for purposes of double jeopardy because Puerto Rico was constitutionally a territory, albeit one with a high level of autonomy and a state-like status: "Both the territorial and federal laws and the courts ... are creations emanating from the same sovereignty. Prosecution under one of the laws in the appropriate court, necessarily, will bar a prosecution under the other law in another court.'" *Id.* at 264. The Court recognized that Puerto Rico possessed "many of the attributes of quasi sovereignty possessed by the states," but nonetheless held that this did not establish *actual* sovereignty for double jeopardy purposes. *Id.* at 261-64. This decision continues to apply today.

2. Congress's 1950-52 Legislation Did Not Transform Puerto Rico Into A Sovereign.

Petitioner does not argue that *Shell* was wrongly decided. Instead, Petitioner contends that when Congress delegated certain powers to Puerto Rico in the early 1950s, it created a heretofore unknown category of 'sovereign territory' and thus overruled *Shell*. Pet. 21-29. It did not.

First and foremost, Congress's legislation neither altered Puerto Rico's status as a constitutional "Territory," nor reduced Congress's plenary power over Puerto Rico. *Harris*, 446 U.S. at 651-52. Indeed, the statute authorizing its territorial constitution was

an ordinary act of Congress, which can be repealed at any time. With Congress possessing the right to revoke and modify all aspects of Puerto Rico's government—including the territorial constitution itself, which Puerto Rico claims to be the source of its sovereignty, *see* Pet. 22—Puerto Rico lacks even the most basic attributes of a sovereign.

Contrary to Petitioner's contention, no case from this Court holds that Congress's 1950-52 legislation altered Puerto Rico's constitutional status. Petitioner cites cases—decided before *Harris*—holding that Puerto Rico is a "state" for purposes of federal statutes that include the word "state" without expressly mentioning Puerto Rico. Pet. 25-26. But those statutory interpretation decisions are a far cry from a decision overruling *Shell*, and in any event, other case law holds that Puerto Rico is *not* a state for purposes of other statutes, based on the particular statutory context at issue. *See Fornaris v. Ridge Tool Co.*, 400 U.S. 41, 42 n.1 (1970).

Petitioner points to the fact that Congress approved Puerto Rico's territorial constitution, which states that it was issued by "[w]e, the people of Puerto Rico." Pet. 22-27. Apparently Petitioner aims to suggest that Puerto Rico possesses the same sovereignty as the United States, whose Constitution's preamble likewise proclaims that it is issued by "[w]e the people." U.S. Const. pmbl. However, the American people's famous statement would have had considerably less resonance if Great Britain retained plenary power to enact legislation over the United States, abolish the

American government, and revoke the federal Constitution itself. That is the power that Congress has over Puerto Rico.

Indeed, Petitioner's argument would apply with identical force to the Commonwealth of the Northern Mariana Islands ("CNMI"). The federal government has formally approved the CNMI territorial constitution, which was likewise issued by "[w]e the people" of the CNMI, and establishes a full territorial government to handle all local affairs. N. Mar. I. Const. pmbl., arts. II-IV, *available at* http://www.cnmilaw.org/constitution.html; Proclamation No. 4534, 42 Fed. Reg. 56,593 (Oct. 24, 1977) (approving CNMI constitution); S. Rep. No. 94-596 at 2 (1976) ("[T]he Marianas constitution and government structure will be a product of a Marianas constitutional convention, *as was the case with Puerto Rico*, rather than through an organic act of the United States Congress." (emphasis added)). Even Petitioner, however, does not contend that the CNMI is a sovereign entity.

Finally, if there were any doubt, the legislative history of the 1950-52 legislation makes clear that Congress never intended to transform Puerto Rico into a new sovereign. Both before and after it approved the new Puerto Rican constitution, Congress stated that its legislation does "not change Puerto Rico's fundamental political, social and economic relationship to the United States." H.R. Rep. No. 81-2275 at 3 (before approval); S. Rep. No. 81-1779 at 3 (before approval); H.R. Rep. 82-1832 at 7 (after approval). Moreover, the Resident

Commissioner of Puerto Rico, the popularly elected Governor of Puerto Rico, and the United States Secretary of the Interior all stated the exact same: "H.R. 7674 would not change the status of the island of Puerto Rico relative to the United States. ... It would not alter the powers of sovereignty acquire by the United States over Puerto Rico under the terms of the Treaty of Paris." *Puerto Rico Constitution: Hearings on HR 7674 and S. 3336 Before the House Comm. on Public Lands*, 81st Cong. 63 (1949-1950) (statement of Antonio Fernós Isern); *id.* at 33 (statement of Governor Luis Muñoz Marín); *id.* at 163-64 (letter from Secretary of the Interior Oscar. L. Chapman to Chairman Joseph C. O'Mahoney). There is no historical basis for the proposition that Congress created a new sovereign.

In sum, the reasoning in *Shell* continues to govern this case. Just as in *Shell*, Puerto Rico may possess the "attributes of quasi sovereignty." 302 U.S. at 261-62. But it remains a constitutional territory, and thus cannot be "sovereign" for double jeopardy purposes.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 15-108

IN THE
Supreme Court of the United States

THE COMMONWEALTH OF PUERTO RICO,

Petitioner,

v.

LUIS M. SÁNCHEZ VALLE AND
JAIME GÓMEZ VÁZQUEZ,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Puerto Rico

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

Respondents do not, and cannot, deny that this case presents a direct and acknowledged conflict between the Puerto Rico Supreme Court and the Eleventh Circuit, on the one hand, and the First Circuit, on the other, on the question whether Puerto Rico and the Federal Government are separate sovereigns for purposes of the Double Jeopardy Clause of the Federal Constitution. Rather, respondents attempt to shield that conflict from this Court's review by arguing that (1) there is "a strong prospect that the First Circuit will reconsider and formally overrule" its position, Opp. 16, (2) "the decision below is plainly correct" on the merits, *id.* at 24, and (3) "the decision below carries no practical consequences on Puerto Rican criminal justice," *id.* at 1, but reviewing it "could have a profound and destabilizing effect on the debate over Puerto Rico's status," *id.* at 21-22. Each of these arguments is manifestly incorrect.

ARGUMENT

I. Respondents' Efforts To Downplay The Direct And Acknowledged Conflict Are Unavailing.

Respondents lead with the remarkable argument that this Court should leave undisturbed the direct and acknowledged conflict on the question presented here because the First Circuit's decision in *United States v. López Andino*, 831 F.2d 1164 (1st Cir. 1987), "may no longer be good law." Opp. 1. According to respondents, that decision rests on "a muddled, perfunctory analysis" that has been called into "serious doubt" by more recent decisions of that

court. *Id.* at 11-12. Respondents are wrong on all scores.

The reasoning of *López Andino* is entirely clear. As that decision recognizes, the question whether Puerto Rico and the Federal Government are separate sovereigns for federal double jeopardy purposes turns on whether "they derive their power from different sources." 831 F.2d at 1167 (citing *Heath v. Alabama*, 474 U.S. 82, 88 (1985), and *United States v. Wheeler*, 435 U.S. 313, 319-22 (1978)). In light of Public Law 600 of 1950 and the subsequent adoption of the Puerto Rico Constitution, it is clear that "[Puerto Rico's] criminal laws, like those of a state, emanate from a different source than the federal laws," *id.* at 1168—namely, "'the people of Puerto Rico,'" who engaged in an exercise of popular sovereignty in 1952 by "'organiz[ing] a government pursuant to a constitution of their own adoption,'" *id.* (quoting Pub. L. No. 81-600, 64 Stat. 319 (1950), Pet. App. 353a). It follows, as *López Andino* holds, that the federal Double Jeopardy Clause poses no barrier to successive prosecutions under Commonwealth and federal law. *Id.*

In this regard, *López Andino* follows a long and unbroken line of First Circuit precedent. That court has consistently recognized that the enactment of Public Law 600 and the Puerto Rico Constitution "work[ed] a significant change in the relation between Puerto Rico and the rest of the United States." *Córdova & Simonpietri Ins. Agency, Inc. v. Chase Manhattan Bank, N.A.*, 649 F.2d 36, 39 (1st Cir. 1981) (Breyer, J.). In particular, "'the constitution of the Commonwealth is not just another Organic Act of the Congress,'" but "'an

expression of the will of the Puerto Rican people.'" *United States v. Quiñones*, 758 F.2d 40, 42-43 (1st Cir. 1985) (quoting *Figueroa v. People of Puerto Rico*, 232 F.2d 615, 620 (1st Cir. 1956)). In light of that Constitution, "the government of Puerto Rico is no longer a federal government agency exercising delegated power." *Id.* at 42; *see also Mora v. Mejías*, 206 F.2d 377, 387 (1st Cir. 1953) (recognizing that the Commonwealth was "organized as a body politic by the people of Puerto Rico under their own constitution, pursuant to the terms of the compact offered to them in Pub. L. 600, and by them accepted").

Respondents insist, however, that "[s]ubsequent developments in the First Circuit cast doubt on *López Andino*'s continuing viability." Opp. 13 (citing *Igartúa-de la Rosa v. United States*, 417 F.3d 145 (1st Cir. 2005) (*en banc*), *Igartúa v. United States*, 626 F.3d 592 (1st Cir. 2010), and *Franklin Cal. Tax-Free Trust v. Puerto Rico*, No. 15-1218, __ F.3d __, 2015 WL 4079422 (1st Cir. July 6, 2015)). But none of those cases casts any doubt on *López Andino* or the other First Circuit precedents recognizing that the people of Puerto Rico, through their own Constitution, are the source of authority for the Commonwealth's laws.

The two *Igartúa* cases hold that residents of Puerto Rico do not have the right to vote in federal elections, either for president or for members of Congress, because Puerto Rico is not a State. *See* 417 F.3d at 147-48; 626 F.3d at 594. Respondents assert that "these cases are difficult to reconcile with *López Andino*'s reasoning that Puerto Rico 'is treated as a state' for constitutional purposes." Opp. 13

(quoting 831 F.2d at 1168). But *López Andino* did not hold that "Puerto Rico 'is treated as a state' for constitutional purposes" generally, *id.*; rather, *López Andino* held only that "Puerto Rico is to be treated as a state *for purposes of the double jeopardy clause*," because its criminal laws emanate from a different source than federal criminal laws. 831 F.2d at 1168 (emphasis added). Indeed, *Igartúa* cited *López Andino* for the proposition that "for some constitutional purposes Puerto Rico has been treated as the functional equivalent of a state." 626 F.3d at 598-99. Whether Puerto Rico is treated as the functional equivalent of a State for purposes of a particular constitutional provision depends on the relevant provision. *See id.*

The First Circuit's recent *Franklin* decision is to the same effect. The First Circuit there rejected a request to interpret a federal bankruptcy statute to avoid Tenth Amendment concerns. *See* 2015 WL 4079422, at *14. According to the court, "[t]he limits of the Tenth Amendment do not apply to Puerto Rico" because that provision protects powers "'reserved to the States'" and Puerto Rico is not a State. *Id.* (quoting U.S. Const. amend. X). Nothing in the *Franklin* decision purported to address the source of authority for Puerto Rico law. Thus, contrary to respondents' assertion, nothing in that decision "establishe[d] that Puerto Rico is *not* a separate sovereign" for federal double jeopardy purposes or "created an intra-circuit conflict on Puerto Rico's sovereign status." Opp. 13, 15 (emphasis in original).

In short, respondents' assertion that "recent authority from the First Circuit casts serious doubt

on the continuing viability of *López Andino*," Opp. 11, is based on nothing more than their own grossly inaccurate characterization of that authority. Indeed, although *López Andino* has been on the books for almost thirty years, respondents cannot point to a *single* First Circuit majority, concurring, or dissenting opinion in all of those years that either criticizes *López Andino* or suggests that the court should revisit that decision.* There is thus no reason to think that the stark conflict on the federal constitutional question presented by this case will go away on its own. Only this Court can ensure the uniform application of the federal Double Jeopardy Clause in the federal and Commonwealth courts of Puerto Rico.

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* Similarly, respondents err by asserting that "the First Circuit will have an opportunity to weigh in on the continuing viability of *López Andino* very soon." Opp. 16 (citing *United States v. Mercado-Flores*, No. 14-cr-466, __ F. Supp. 3d __, 2015 WL 3764518 (D.P.R. June 4, 2015)). Once again, the cited case has nothing to do with the Double Jeopardy Clause or the source of authority for Puerto Rico's laws. Rather, that case presents the far more mundane question whether a federal statute that applies to "any Territory, or Possession of the United States," but not to a "Commonwealth," applies to Puerto Rico. *See* 2015 WL 3764518, at *1. It is thus fanciful for respondents to assert that "the First Circuit will ... soon clarify whether and to what extent *López Andino* remains binding precedent," Opp. 17, in that case. As the district court there explained, "'whether and how a federal statute applies to Puerto Rico is a question of Congressional intent.'" 2015 WL 3764518, at *6 (quoting *Antilles Cement Corp. v. Fortuño*, 670 F.3d 310, 320 (1st Cir. 2012)). Indeed, respondents themselves acknowledge that whether Puerto Rico is covered by any particular federal statute is necessarily "based on the particular statutory context at issue." Opp. 29.

II. Respondents' Efforts To Defend The Decision Below Are Unavailing.

Respondents also contend that "[r]eview is unwarranted here for the additional reason that the decision below is plainly correct." Opp. 24. In their view, Puerto Rico cannot be a separate sovereign under the Double Jeopardy Clause if it is subject to congressional control under the Territorial Clause. *See id.* at 24-28; *see generally* Pet. App. 65-66a. As they put it, "States are sovereign, but Territories are not." Opp. 24.

Respondents thereby miss the point. As this Court has explained, the "extent of control exercised by one prosecuting authority over the other" is not the touchstone of the dual sovereignty analysis. *Wheeler*, 435 U.S. at 320. Rather, that analysis turns on "the ultimate *source* of the power under which the respective prosecutions were undertaken." *Id.* (emphasis added); *see also United States v. Lara*, 541 U.S. 193, 199 (2004); *Heath*, 474 U.S. at 88-90. Because the laws of Puerto Rico flow from authority delegated by the people of Puerto Rico through their own Constitution, *see* P.R. Const. pmbl., Pet. App. 358a; *id.* art. I § 1, Pet. App. 359a, not from authority delegated by Congress, it follows that Puerto Rico and the Federal Government are separate sovereigns for double jeopardy purposes, *see López Andino*, 831 F.2d at 1167-68.

Respondents insist, however, that "this Court held in 1937 that Puerto Rico was not a separate sovereign from the United States for purposes of double jeopardy because they 'exert all their powers under and by authority of the same government.'" Opp. 24-25 (quoting *Puerto Rico v. Shell Co. (P.R.)*,

302 U.S. 253, 265 (1937)). As a threshold matter, the holding of that case had nothing to do with double jeopardy, because it was a statutory case involving the preemptive scope of the Sherman Act. *See* 302 U.S. at 255. And the dictum on which respondents rely predates the enactment of Public Law 600 and the Puerto Rico Constitution, and thus sheds no light on the question presented here. As explained above, it has been clear since 1952 that the people of Puerto Rico, through their Constitution, are the source of authority for Puerto Rico's laws. It follows that respondents' reliance on *Shell*, a pre-1952 case, is unavailing. Indeed, that is the very lesson of then-Judge Breyer's opinion for the First Circuit in *Córdova*, which recognized that the result in *Shell* had been rendered obsolete by the enactment of Public Law 600 and the Puerto Rico Constitution. *See* 649 F.2d at 38-42.

Respondents' reliance on "the legislative history of the 1950-52 legislation," Opp. 30, is similarly unavailing. According to respondents, that history "makes clear that Congress never intended to transform Puerto Rico into a new sovereign." *Id.* But, once again, that is nothing more than a play on the word "sovereign." The legislative history cited by respondents simply underscores that Congress did not intend to grant Puerto Rico independence from the United States. *See id.* at 30-31. Nothing in that history casts any doubt on the proposition that, as a result of Puerto Rico's adoption of its own Constitution, the laws of Puerto Rico would henceforth flow from authority delegated by the people of Puerto Rico, not by Congress. Indeed, Public Law 600 by its terms authorized "*the people of Puerto Rico* [to] organize a government pursuant to a

constitution *of their own adoption*." Pub. L. No. 81-600, 64 Stat. 319 (1950), Pet. App. 353a (emphasis added). Since the people of Puerto Rico democratically enacted their own Constitution in 1952, the laws of the Commonwealth have flowed from a different source of authority than federal laws, and Puerto Rico and the Federal Government have been separate sovereigns for federal double jeopardy purposes. *See López Andino*, 831 F.2d at 1167-68 (citing *Heath*, 474 U.S. at 88, and *Wheeler*, 435 U.S. at 319-22); *see also Lara*, 541 U.S. at 199.

III. Respondents' Efforts To Distort The Ramifications Of This Case Are Unavailing.

Respondents finally urge this Court to deny review by downplaying the significance of the decision below to the administration of justice in Puerto Rico, *see* Opp. 17-20, while exaggerating the supposedly destabilizing effects of reversing that decision in other contexts, *see id.* at 20-24. Neither set of arguments withstands scrutiny.

A. This Case Will Significantly Affect The Administration Of Justice In Puerto Rico.

Respondents contend that "the decision below carries no practical consequences on Puerto Rican criminal justice," because "[a] reversal by this Court will almost certainly result in the Puerto Rico Supreme Court reaching the identical result based on the Puerto Rico Constitution." Opp. 1. That contention is wrong in every respect.

The decision below has already had a profound impact on the administration of justice in Puerto Rico. Criminal defendants in cases pending in Commonwealth courts are moving for (and

obtaining) dismissal of charges based on that decision. *See, e.g.*, *Pueblo v. Natal Bracetti*, No. KLCE2015-01026 (P.R. Cir.) (Commonwealth appeal from order granting dismissal); *Pueblo v. Ramírez Berríos*, No. VP-2008-2705-2735 (P.R. Super.) (dismissal granted); *Pueblo v. Román Vega*, No. ALA2015G0043 *et al.* (P.R. Super.) (same); *Pueblo v. Lasalle González*, No. C VI2014G0038 *et al.* (P.R. Super.) (same); *Pueblo v. Carrión Cruz*, No. NSCR2012-1433 (P.R. Super.) (motion pending). Similarly, criminal defendants convicted in Commonwealth courts are demanding relief based on the decision below. *See, e.g.*, *Pueblo v. Santiago Otero*, No. J SC2014G0219 *et al.* (P.R. Super.) (motion pending); *Pueblo v. Belardo Colón*, No. NSCR201200137 (P.R. Super.) (same). Meanwhile, the Commonwealth is limited in its ability to prosecute defendants previously prosecuted in federal court, and faces the prospect that defendants in pending proceedings may plead guilty to federal charges to avoid potentially more serious punishment under Commonwealth law (as respondents here did).

This Court has previously characterized this situation as "'shocking and untoward.'" *Wheeler*, 435 U.S. at 318 n.8 (quoting *Bartkus v. Illinois*, 359 U.S. 121, 128-39 (1959)). It is no consolation for respondents to suggest that Puerto Rico could try to "arrange with [federal prosecutors] to bring its prosecution first." Opp. 19. As respondents themselves acknowledge, federal prosecutors may "insist[] on bringing [their] prosecution first," *id.*, and in any event Puerto Rico should not have to obtain permission from federal officials to enforce its own criminal laws in its own courts.

Nor is it any answer to predict, as respondents do, that the Puerto Rico Supreme Court "would likely grant respondents the same relief under the Puerto Rico Constitution" if this Court were to reverse the decision below. Opp. 17. There is absolutely no basis for that prediction; to the contrary, if the Puerto Rico Supreme Court had wanted to rest its holding on Commonwealth law, it could have done so. But it did just the opposite, conspicuously resting its holding exclusively on federal constitutional law, and insisting that *this* Court's precedents compelled its decision. *See* Pet. App. 62-69a. Indeed, respondents concede that "the justices in the majority *did not address*" double jeopardy under the Puerto Rico Constitution. Opp. 18 (emphasis added).

As explained in the petition, it is "anomalous and untenable" for the Double Jeopardy Clause of the Federal Constitution to be applied differently in the federal and Commonwealth courts of Puerto Rico. Pet. 3. The same provision of the Federal Constitution cannot possibly prevent the Commonwealth from prosecuting a defendant who has been prosecuted in federal court while allowing the Federal Government to prosecute a defendant who has been prosecuted in Commonwealth court. But that is precisely the situation now, given the direct and acknowledged conflict between the Puerto Rico Supreme Court and the Eleventh Circuit, on the one hand, and the First Circuit, on the other, on the federal constitutional question presented here.

The fact that several States have construed the double jeopardy provisions of their *own* constitutions to bar successive prosecutions by different sovereigns, *see* Opp. 18-19, has no bearing on this

anomaly. Puerto Rico, like a State, is free to provide rights beyond those provided by the Federal Constitution. But that is a far cry from having the application of a *federal* constitutional provision in Puerto Rico turn on whether a defendant is prosecuted first in federal or Commonwealth court.

B. This Case Will Not "Destabilize" Other Areas Of The Law.

Finally, respondents contend that "perhaps the strongest reason to deny certiorari in this case" is that a decision by this Court may "resolve the controversial political debate over the status of Puerto Rico." Opp. 20 (emphasis omitted). In particular, they warn that "[a] declaration by this Court that Puerto Rico is, or is not, a 'sovereign,' could have a profound and destabilizing effect on the debate over Puerto Rico's status," and "could have dramatic effects on other Puerto Rican status litigation." Opp. 21-22.

But no one is asking this Court to "resolve the controversial political debate over the status of Puerto Rico," or to "declar[e] ... that Puerto Rico is, or is not, a 'sovereign'" for any and all purposes. Opp. 20, 21-22. Rather, the Commonwealth is simply asking this Court to exercise its traditional authority "to say what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), by resolving a direct and acknowledged conflict among the lower courts on a question of federal constitutional law. Having sought and obtained a ruling on that question below, respondents are in no position now to shield that ruling from this Court's review as too "controversial." Opp. 20. It is inaccurate and offensive for respondents to suggest that this Court cannot

resolve the legal question presented here without "wad[ing] into the divisive debate over Puerto Rico's constitutional status in the United States," or triggering "complex and unpredictable consequences" on a variety of other constitutional questions not presented by this case. *Id.* at 1, 21.

CONCLUSION

For the foregoing reasons, and those set forth in the petition, this Court should grant review.

Respectfully submitted,

CÉSAR MIRANDA RODRÍGUEZ
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Supreme Court, U.S.
FILED
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No. 15-108

IN THE
Supreme Court of the United States

THE COMMONWEALTH OF PUERTO RICO,
Petitioner,

v.

LUIS M. SÁNCHEZ VALLE AND
JAIME GÓMEZ VÁZQUEZ,
Respondents.

On Writ of Certiorari
to the Supreme Court of Puerto Rico

JOINT APPENDIX

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November 16, 2015

PETITION FOR WRIT OF CERTIORARI FILED JULY 17, 2015
CERTIORARI GRANTED OCTOBER 1, 2015

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NEXT ACTION REP GOOD CONSULTATION, REPETITIVE FORM

SUBORDINATE :CC02013-0072

T213 SCREENS REPORTS | CASE NUMBER | CC-2013-0068 | THE PEOPLE OF PUERTO RICO-SANCHEZ VALLE, LUIS CERTIORARI

DATE AND TIME		130113 1248	
051015	0945	NOTICE	US SUPREME COURT
270715	1036	NOTICE	USA SUPREME COURT
110615	1032	NOTICE	SUPREME COURT OF USA
100415	1327	RETURNED MAIL	MAIL
061113	1546	MOTION UNDER RULE 33 (K)	PEOPLE PR
200813	1245	MOTION TO CONSOLIDATE	PET
020513	1026	EXECUTED ORDER	MARSHALLS
230113	1248	PETITION FOR CERTIORARI	PET

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I, Aida Ileana Oquendo Graulau, Clerk of the Supreme Court of Puerto Rico, hereby CERTIFY:

That the present document is a printout of the automated case system used by the Supreme Court of Puerto Rico, that reflects the writs filed or received to this date in case CC-2-13-0068. *Pueblo de Puerto Rico v. Luis Sánchez Valle.*

In witness whereof, and at the request of the Commonwealth of Puerto Rico, I issue the certification herein duty-free under my signature and the seal of the Supreme Court of Puerto Rico, today, October 8, 2015.

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GENERAL COURT OF JUSTICE
COURT OF FIRST INSTANCE
CAROLINA SUPERIOR COURT
Fl 35 (illegible initials)]

[Signed: AI Oquendo]
Aida Ileana Oquendo Graulau
Clerk of the Supreme Court

CERTIFICATE OF TRANSLATION INTO ENGLISH

I, Barbara M. Cohen, of legal age, married, resident of Fiesta, CA, professional interpreter/ translator, certified by the Administrative Office of the United States Courts and an accredited member in good standing of the American Translators Association, do **HEREBY CERTIFY** that I have personally revised the foregoing document and that it is a true and accurate revised to the best of my knowledge and abilities.

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SUBORDINATE :CC2013-0068

T213 SCREENS REPORTS	CASE NUMBER		CC-2013-0068	THE PEOPLE OF PUERTO RICO-GOMEZ VAZQUEZ, JAIME
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	051015	0945	NOTICE	US SUPREME COURT
	270715	1036	NOTICE	USA SUPREME COURT
	110615	1032	NOTICE	SUPREME COURT OF USA
	061113	1546	MOTION UNDER RULE 33 (c)	PEOPLE PR
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	180613	1418	MOTION FOR EXTENSION OF TIME	PET
	220513	1411	ORIGINAL RECORD	CA
	020513	1026	EXECUTED ORDER	MARSHALLS
	240113	1626	PETITION FOR CERTIORARI	PET

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Dimarie Alicea Lozada, Esq. Tel. (787) 474-3778
Clerk of the Court Fax. (787) 753-5372

October 16, 2015

Monica M. Cordero Vázquez
Assistant General Prosecutor

RE: PUEBLO V. LUIS SANCHEZ VALLE, JAIME GOMEZ VAZQUEZ, RENE BETANCOURT AND RAFAEL DELGADO (KLCE2012-1032, 1325)

KLCE2012-1032 Luis Sánchez Valle

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		12/19/2012 Mandate

Cordially

[illegible signature]
Dimarie Alicea Lozada

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Barbara M. Cohen

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Commonwealth of Puerto Rico
General Court of Justice
COURT OF FIRST INSTANCE
Carolina Judicial Center

Miriam Rosa Maldonado
Regional Clerk

PO Box 267
Carolina, PR 00986-0267

CERTIFICATION

I, Miriam Rosa Maldonado, Regional Clerk of the Court of First Instance, Carolina Part, hereby CERTIFY:

The following documents pertain to cases VP08-2802 to 2804, of Luis M. Sánchez Valle.

Sept. 23, 2008	Authorization to Submit the case before a Magistrate
Sept.26, 2008	3 Complaints
Sept. 29,2008	Special Warnings
Sept.29, 2008	Commitment Order
Sept. 26, 2008	Arrest Warrant / Luis M. Sanchez Valle
Sept. 29, 2008	Executed Arrest Warrant / Luis M. Sanchez Valle
Sept. 29, 2008	Summons of Defendant and Subpoena of Witness
Sept. 29, 2008	Proof of Service of Summons
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April, 3, 2009	Summons
May 29, 2009	Summons
July 7, 2009	Summons
Aug 3, 2009	Petition
Aug 6, 2009	Summons
Aug 17, 2009	Motion in Compliance with Order to Inform and State the Position of the Office of the Prosecutor
Sept 15, 2009	Petition
Sept 16, 2009	Writ of Habeas Corpus Ad Prosequendum
Sept 16, 2009	Order
Sept 22, 2009	Summons

Dec 18, 2009	Notice
April 21, 2010	Summons
June 15,2010	Motion in Compliance with Order and Request for Dismissal
June 23,2010	Motion Opposing Motion for Dismissal
June 26,2012	Resolution
Nov. 5,2012	Amended Notice of Judgment

In witness whereof and at the request of Monica M. Cordero Vazquez, Esq., Solicitor General of the Department of Justice, I issue the certification herein duty-free under my signature and the seal of the Court.

In Carolina, Puerto Rico, October 15, 2015.

[Signed: M. Rosa]
Miriam Rosa Maldonado
Regional Clerk

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CERTIFICATE OF TRANSLATION INTO ENGLISH

I, Barbara M. Cohen, of legal age, married, resident of Fincia, CA, professional interpreter/ translator, certified by the Administrative Office of the United States Courts and an accredited member in good standing of the American Translators Association, do HEREBY CERTIFY that I have personally revised the foregoing document and that it is a true and accurate revised to the best of my knowledge and abilities.

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Miriam Rosa Maldonado
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CERTIFICATION

I, Miriam Rosa Maldonado, Regional Clerk of the Court of First Instance, Carolina Part, hereby CERTIFY:

The following documents pertain to cases VP08-2805 to 2807, of Jaime A. Gómez Vázquez.

Sept 23, 2008	Authorization to Submit the case before a Magistrate
Sept 26, 2008	3 Complaints
Sept 26, 2008	Arrest Warrant / Jaime A. Gómez Vázquez
Sept 29, 2008	Special Warnings
Sept 29, 2008	Summons of Defendant and Witness Subpoena
Sept 29, 2008	Certification
Oct 7, 2008	Witnesses Subpoenaed for Preliminary Hearing / Off. Abraham Sanchez
Oct 7, 2008	Witnesses Subpoenaed for Preliminary Hearing / Off. Artemio Amaro
Oct 15,2008	Summons
Nov 26, 2009	Summons
Dec 5,2008	Summons
March 3, 2009	Summons to Preliminary Hearing
March 13, 2009	Summons
April 3, 2009	Summons
May 29, 2009	Summons
July 8, 2009	Summons to Preliminary Hearing / Off. Abraham Sanchez
July 8, 2009	Summons to Preliminary Hearing / Off. Artemio Amaro
Aug 5, 2009	Urgent Informative Motion Requesting Release from Supervision and Arrest Warrant
Aug 17 2009	Motion in Compliance with Order to Inform and State the Position of the Office of the Prosecutor
Aug 27, 2009	Motion in Compliance with Order
Sept 15, 2009	Petition
Sept 16, 2009	Writ of Habeas Corpus Ad Prosequendum
Sept. 16, 2009	Order
Sept. 22, 2009	Summons
Aug. 27, 2010	Motion in Compliance with Order and Requesting Dismissal of Complaints Pursuant to Constitutional Right against Double Jeopardy
Oct. 21, 2010	Motion Opposing Motion for Dismissal
Nov. 3, 2010	Notice
June 26, 2012	Resolution
Nov. 5, 2012	Amended Notice of Judgment

In witness whereof and at the request of Monica M. Cordero Vazquez, Esq., Solicitor General of the Department of Justice, I issue the certification herein duty-free under my signature and the seal of the Court.

In Carolina, Puerto Rico, October 15, 2015.

[Signed: M. Rosa]
Miriam Rosa Maldonado
Regional Clerk

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In San Juan, Puerto Rico, today, November 9, 2015.

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RECEIVED AND FILED CLERK'S OFFICE U.S. DISTRICT COURT SAN JUAN, PR

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA,

Plaintiff,

v.

1) HECTOR GOMEZ-PASTRANA, aka Trompe,
2) LUIS SANCHEZ VALLE, aka Pepo Defendants,

INDICTMENT

Criminal No. 09-254 (FAB)

Violations:
Title 18, *United States Code*, Sections 922(a)(1), 924(d) and 2;
Title 28, *United States Code*, Section 2461(c)

(FIVE COUNTS)

THE GRAND JURY CHARGES:

COUNT ONE

(Dealing in firearms without a license)
Title 18, *United States Code*. Sections 922(a)(1)(A), 923(a) and 924(a)(1)(D).

On or about March 22, 2008, in the District of Puerto Rico, and elsewhere within the jurisdiction of this Court,

1) HECTOR GOMEZ PASTRANA aka Trompe,

the defendant herein, not being a licensed dealer of firearms within the meaning of Chapter 44, Title 18, *United States Code*, did willfully engage in business

of dealing firearms, that is, said defendant sold one (1) Smith & Wesson pistol, black in color, model SW9VE, caliber 9mm, serial number PDW2536, loaded with sixteen (16) rounds of ammunition of its own caliber; and additional magazine loaded with sixteen (16) rounds of caliber 9mm ammunition and a box with forty nine (49) rounds of caliber 9mm ammunition, to a Police of Puerto Rico Undercover Agent, which firearm and ammunition had been shipped or transported in interstate or foreign commerce. All in violation of Title 18, *United States Code*, Sections 922(a)(1)(A), 923(a), 924(a)(1)(D).

COUNT TWO

(Dealing in firearms without a license)
Title 18, *United States Code*, Sections
922(a)(1)(A), 923(a) and 924(a)(1)(D)

On or about April 18, 2008, in the District of Puerto Rico, and elsewhere within the jurisdiction of this Court,

1) HECTOR GOMEZ PASTRANA aka Trompe,

the defendant herein, not being a licensed dealer of firearms within the meaning of Chapter 44, Title 18, *United States Code*, did willfully engage in the business of dealing firearms, that is, said defendant sold one (1) Ruger pistol, chrome in color, model P94, caliber 9mm, serial number 308-45129, loaded with ten (10) rounds of ammunition of its own caliber to a Police of Puerto Rico Undercover Agent, which firearm and ammunition had been shipped or transported in interstate or foreign commerce. All in violation of Title 18, *United States Code*, Sections 922(a)(1)(A), 923(a), 924(a)(1)(D).

COUNT THREE
(Dealing in firearms without a license)
Title 18, *United States Code*, Sections 922(a)(1)(A), 923(a) and 924(a)(1)(D).

On or about May 7, 2008, in the District of Puerto Rico, and elsewhere within the jurisdiction of this Court,

1) HECTOR GOMEZ PASTRANA aka Trompe,

the defendant herein, not being a licensed dealer or importer of firearms within the meaning of Chapter 44, Title 18, *United States Code*, did willfully engage in the business of dealing firearms, that is, said defendant sold one (1) Yugoslavia Rifle, black in color, model 59/66, caliber 7.62, serial number 0-579616, to a Police of Puerto Rico Undercover Agent, which firearm had been shipped in interstate or foreign commerce. All in violation of Title 18, *United States Code*, Sections 922(a)(1)(A), 923(a), 924(a)(1)(D).

COUNT FOUR
(Dealing in firearms without a license, Aiding and Abetting)
Title 18, *United States Code*, Sections 922(a)(1)(A), 923(a) and 924(a)(1)(D) and 2

On or about August 22, 2008, in the District of Puerto Rico, and elsewhere within the jurisdiction of this Court,

1) HECTOR GOMEZ-PASTRANA aka Trompe,
2) LUIS SANCHEZ VALLE, aka Pepo,

the defendants herein, aiding and abetting each other, not being licensed dealers or importers of firearms within the meaning of Chapter 44, Title 18, *United States Code*, did willfully engage in the

business of dealing firearms, that is, said defendants sold one (1) FM pistol, black in color, model detective, caliber 9mm, serial number 345064 with one magazine and twenty three (23) rounds of caliber 9mm ammunition, to a Police of Puerto Rico Undercover Agent, which firearm and ammunition had been shipped or transported in interstate or foreign commerce. All in violation of Title 18, *United States Code*, Sections 922(a)(1)(A), 923(a),924(a)(1)(D) and 2.

COUNT FIVE
(Firearms and Ammunition Forfeiture Allegation)
Title 18, *United States Code*, Sections 924(d) and Title 28, *United States Code*, Section 2461(c)

The allegations contained in Counts One through Five of this Indictment are hereby re-alleged and incorporated by reference for the purpose of alleging forfeitures pursuant to Title 18, *United States Code*, Section 924(d) and Title 28, *United States Code*, Section 2461(c).

Upon conviction of the offense in violation of Title 18, *United States Code*, Sections 922(a)(1)(A) and 2, set forth in Counts One through Five of this Indictment, the defendants,

1) HECTOR GOMEZ-PASTRANA aka Trompe,
2) LUIS SANCHEZ VALLE, aka Pepo

shall forfeit to the United States pursuant to Title 18, *United States Code*, Section 924(d) and Title 28, *United States Code*, Section 2461(c), any firearms and ammunition involved or used in furtherance of the commission of the drug trafficking offense,

including, but not limited to: one (1) Smith & Wesson pistol, black in color, model SW9VE, caliber 9mm, serial number PDW2536, loaded with sixteen (16) rounds of ammunition of its own caliber; and additional magazine loaded with sixteen (16) rounds of caliber 9mm ammunition and a box with forty nine (49) rounds of caliber 9mm ammunition; one (1) Ruger pistol, chrome in color, model P94, caliber 9mm, serial number 308-45129, loaded with ten (10) rounds of ammunition of its own caliber; one (1) Yugoslavia Rifle, black in color, model 59/66, caliber 7.62, serial number O-579616; one (1) FM pistol, black in color, model detective, caliber 9mm, serial number 345064 with one magazine and twenty three (23) rounds of caliber 9mm ammunition.

If any of the property described above, as a result of any act or omission of the defendants:

a. cannot be located upon the exercise of due diligence;

b. has been transferred or sold to, or deposited with, a third party;

c. has been placed beyond the jurisdiction of the court;

d. has been substantially diminished in value; or

e. has been commingled with other property which cannot be divided without difficulty,

the United States of America shall be entitled to forfeiture of substitute property pursuant to Title 21, *United States Code*, Section 853(p), as incorporated by Title 28, *United States Code*, Section 2461(c). All pursuant to Title 18, *United States Code*, Section 924(d) and Title 28, *United States Code*, Section 2461(c).

TRUE BILL

ROSA EMILIA RODRIGUEZ-VELEZ
United States Attorney

Date: 7/28/09

/s/ José Ruiz-Santiago
José Ruiz-Santiago
Assistant United States Attorney
Chief, Criminal Division

/s/ Warren Vazquez
Warren Vazquez
Chief, Violent Crimes Unit

/s/ Carmen M. Marquez
Carmen M. Marquez
Assistant United States Attorney

RECEIVED AND
FILED
OCT 09 2009
CLERK'S OFFICE
U.S. DIST. COURT

UNITED STATES DISTRICT COURT FOR
DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA,

Plaintiff,

LUIS SANCHEZ-VALLE,

Defendant,

CASE NO. 09-254 (FAB)

PLEA AGREEMENT

(Pursuant to Rule 11 (c)(1)(A) & (B) FRCP)

TO THE HONORABLE COURT:

COMES NOW the United States of America through its counsel Rosa Emilia Rodríguez-Vélez, United States Attorney for the District of Puerto Rico, José Ruíz-Santiago, Assistant United States Attorney, Chief, Criminal Division, Warren Vázquez, Assistant U.S. Attorney, Chief, Violent Crimes Unit, Carmen M. Márquez-Marín, Assistant U.S. Attorney. defendant's counsel, Joseph A. Boucher-Martinez, Esq. and the defendant Luis Sanchez-Valle, pursuant to Rule 11(c)(1)(B) of the Federal Rules of Criminal Procedure, state to this Honorable Court, that they have reached an agreement, the terms and conditions of which are as follows:

1. **COUNTS TO WHICH DEFENDANT PLEADS GUILTY**

The defendant agrees to plead guilty to **Counts Four** and **Five** of the Indictment.

Count Four charges: On or about August 22, 2008, in the District of Puerto Rico and within the jurisdiction of this Court, **[1] Hector Gomez-Pastrana**, and **[2] Luis Sanchez-Valle**, the defendants herein, aiding and abetting each other, not being licensed dealers or importers of firearms, within the meaning of Chapter 44, Title 18, *United States Code*, did willfully engage in the business of dealing firearms, that is, said defendants sold one (1) FM pistol, black in color, model detective, caliber 9mm, serial number 345064 with one magazine and twenty three (23) rounds of caliber 9mm ammunition, to a Police of Puerto Rico Undercover Agent, which firearm and ammunition had been shipped or transported in interstate or foreign commerce. All in violation of Title 18, *United States Code*, 922(a)(1)(A), 923(a) and 924(a)(1)(D) and 2.

Count Five is a firearm and ammunition forfeiture allegation.

2. MAXIMUM PENALTIES

The penalty for the offense charged in **Count Four** of the Indictment is a term of imprisonment of not more than five (5) years and a fine not to exceed $250,000.00, a term of supervised release of not more than one (1) year, all pursuant to Title 18, *United States Code*, Section 924(a)(1)(D).

3. APPLICABILITY OF SENTENCING GUIDELINES

Defendant acknowledges that the Court may impose a sentence in accordance with the applicable provision(s) of the Sentencing Guidelines, Title 18 *United States Code*, Section 3551, *et seq.* (hereinafter Guidelines), which are now advisory. Further, the

defendant acknowledges to be aware that parole has been abolished and the imposition of sentence may not be suspended.

4. SPECIAL MONETARY ASSESSMENT

Prior to defendant's change of plea hearing, the defendant shall pay a special monetary assessment of one hundred dollars ($100.00) per count of conviction.

5. FINES AND RESTITUTION

The defendant is aware that the Court may, pursuant to Section 5E1.2 of the *Sentencing Guidelines Manual*, order the defendant to pay a fine sufficient to reimburse the government for the costs of any imprisonment, probation or supervised release ordered and also the Court may impose restitution. As part of this Plea Agreement, the defendant agrees to produce complete information regarding all restitution victims and defendant agrees to execute a financial statement to the United States (OBD Form 500), The United States will make no recommendations as to the imposition of fines or restitution.

6. RULE 11(c)(1)(B) WARNINGS

The defendant is aware that the defendant's sentence is within the sound discretion of the sentencing judge and the advisory Sentencing Guidelines (including the *Guidelines Policy Statements*, *Application*, and *Background Notes*). The defendant understands and acknowledges that the Court is not a party to this Plea Agreement and thus, is not bound by this agreement or the sentencing calculations and/or recommendations contained herein. Defendant specifically

acknowledges and admits that the Court has jurisdiction and authority to impose any sentence within the statutory maximum set for the offense to which the defendant pleads guilty.

Defendant is aware that the court may accept or reject the Plea Agreement, or may defer its decision whether to accept or reject the Plea Agreement until it has considered the pre-sentence report. Should the Court impose a sentence up to the maximum established by statute, the defendant cannot, for that reason alone, withdraw the guilty plea, and will remain bound to fulfill all of the obligations under this Plea Agreement.

7. SENTENCING GUIDELINES CALCULATIONS

Although the Guidelines are now advisory, *United States v. Booker*, 125 S. Ct. 738, 744, 160 L.Ed.2d 621 (2005), makes clear the sentencing court is required to consider the Guidelines "sentencing range established for ... the applicable category of offense committed by the applicable category of defendant" in imposing sentence. *Booker*, 125 S.Ct. at 744. Therefore, the United States and the defendant submit the following advisory Sentencing Guidelines calculations:

SENTENCE GUIDELINES CALCULATION-COUNT FOUR	
BASE offense level [U.S.S.G. § 2K2.1(7)]	**12**
Specific offense characteristics [U.S.S.G § 2K2.1 (b)(5)]; • **Since the defendant engaged in the trafficking of firearms**	**+4**
Minor Participant [[U.S.S.G. § 3B1.2]	**-2**
Acceptance of Responsibility pursuant to [U.S.S.G. § 3E1.1]	**-3**

ADJUSTED OFFENSE LEVEL	11

* * * * There is no stipulation as to defendant's Criminal History Category If he is in: CHC I.....8-14 months imprisonment CHC II.....10-16 CHC III.....12-18 CHC IV.....18-24	

8. SENTENCE RECOMMENDATION

The parties agree to recommend to the Court, that the defendant be sentenced at the lower end of the applicable sentencing guideline.

9. NO FURTHER ADJUSTMENTS OR DEPARTURES

The United States and the defendant agree that no further adjustment or departures to the defendant's adjusted offense level shall be sought by the parties. The parties agree that any recommendation for a different term of imprisonment would constitute a material breach of the plea agreement.

10. SATISFACTION WITH COUNSEL

The defendant represents to the Court to be satisfied with defendant's counsel Joseph A. Boucher-Martinez, Esq. and indicates that counsels have rendered effective legal assistance.

11. RIGHTS SURRENDERED BY DEFENDANT THROUGH GUILTY PLEA

Defendant understands that by entering into this agreement, defendant surrenders certain rights as provided in this agreement. Defendant understands that the rights of criminal defendants include the following:

a. If the defendant had persisted in a plea of not guilty to the charges, defendant would have had the right to a speedy jury trial with the assistance of counsel. The trial may be conducted by a judge sitting without a jury if the defendant, the United States and the judge agree.

b. If a jury trial is conducted, the jury would be composed of twelve lay persons selected at random. The defendant and the defendant's attorney would assist in selecting the jurors by removing prospective jurors for cause where actual bias or other disqualification is shown, or by removing prospective jurors without cause by exercising peremptory challenges. The jury would have to agree, unanimously, before it could return a verdict of either guilty or not guilty. The jury would be instructed that the defendant is presumed innocent, that it could not convict the defendant unless, after hearing all the evidence, it was persuaded of the defendant's guilt beyond a reasonable doubt, and that it was to consider each charge separately.

c. If a trial is held by the judge without a jury, the judge would find the facts and, after hearing all the evidence and considering each count .separately, determine whether or not the evidence established the defendant's guilt beyond a reasonable doubt.

d. At a trial, the United States would be required to present its witnesses and other evidence against the defendant. The defendant would be able to confront those witnesses and defendant's attorney would be able to cross-examine them. In turn, the defendant could present witnesses and other evidence on defendant's own behalf. If the witnesses for the defendant would not appear voluntarily,

defendant could require their attendance through the subpoena power of the Court.

e. At a trial, the defendant could rely on the privilege against self-incrimination to decline to testify, and no inference of guilty could be drawn from the defendant's refusal to testify. If the defendant desired to do so, the defendant could testify on the defendant's own behalf.

12. STATEMENT OF FACTS

The accompanying Statement of Facts signed by the defendant is hereby incorporated into this Plea Agreement. Defendant adopts the Statement of Facts and agrees that the facts therein are accurate in every respect and, had the matter proceeded to trial, that the United States would have proven those facts beyond a reasonable doubt.

13. LIMITATIONS OF PLEA AGREEMENT

This plea agreement binds only the United States Attorney's Office for the District of Puerto Rico and the defendant; it does not bind any other federal district, state or local authorities

14. ENTIRETY OF PLEA AGREEMENT

This written agreement constitutes the complete Plea Agreement between the United States, the defendant, and the defendant's counsel. The United States has made no promises or representations except as set forth in writing in this plea agreement and deny the existence of any other term and conditions not stated herein.

15. AMENDMENTS TO PLEA AGREEMENT

No other promises, terms, conditions will be entered unless in writing, signed by all parties.

16. VOLUNTARINESS OF GUILTY PLEA

The defendant acknowledges that no threats have been made against the defendant and that the defendant is pleading guilty freely and voluntarily because the defendant is guilty.

17. WAIVER OF APPEAL

The defendant hereby agrees that if this Honorable Court accepts this Plea Agreement and sentences him according to its terms, conditions and recommendations, defendant waives and surrenders his right to appeal the judgment and sentence in this case.

RESPECTFULLY SUBMITTED.

ROSA EMILIA RODRIGUEZ-VELEZ
United States Attorney

/s/ José Ruíz Santiago
José Ruíz Santiago
Assistant U.S. Attorney
Chief, Criminal Division
Dated: 9/28/09

/s/ Joseph A. Boucher-Martinez
Joseph A. Boucher-Martinez, Esq.
Counsel for Defendant
Dated:

/s/ Warren Vázquez
Warren Vázquez
Assistant U.S. Attorney
Acting Deputy Chief,
Violent Crimes Unit

/s/ Luis Sanchez-Valle
Luis Sanchez-Valle
Defendant
Dated: 9/10/09

/s/ Carmen M. Marquez-Marin
Assistant U.S. Attorney
Dated: 9/28/09

I have consulted with my counsel and fully understand all of my rights with respect to the Indictment pending against me. Further, I have consulted with my attorney and fully understand my rights with respect to the provisions of the

Sentencing Guidelines, Policy Statements, Application, and *Background Notes* which may apply in my case. I have read this Plea Agreement and carefully reviewed every part of it with your attorney. I fully understand this agreement and I voluntarily agree to it.

Date: 10/9/09 */s/ Luis Sanchez-Valle*
Luis Sanchez-Valle
Defendant

I am the attorney for the defendant. I have fully explained to the defendant his rights with respect to the pending Indictment. Further, I have reviewed the provisions of the *Sentencing Guidelines, Policy Statements, Application*, and *Background Notes*, and I have fully explained to the defendant the provisions of those guidelines which may apply in this case. I have carefully reviewed every part this Plea Agreement with the defendant. To my knowledge, the defendant is entering into this agreement voluntarily, intelligently and with full knowledge of all consequences of defendant's plea of guilty.

Date: 10/9/09 */s/ Joseph A. Boucher-Martinez*
Joseph A. Boucher-Martinez, Esq.
Counsel for Defendant

STATE OF FACTS

On or about August 22, 2008 Luis Sanchez-Valle and others sold one (1) FM pistol, black in color, model detective, caliber 9mm, serial number 345064 with one magazine and twenty three (23) rounds of caliber 9mm ammunition, to a Police of Puerto Rico Undercover Agent, which firearm and ammunition had been shipped or transported in interstate or foreign commerce.

At trial, the United States would have proven beyond a reasonable doubt that defendant Luis Sanchez-Valle is guilty as charged in Count Four of the Indictment by presenting; the (a) physical evidence seized, such as, [the] FM pistol with one magazine and twenty three (23) rounds of caliber 9mm ammunition sold by the defendant; (b) documentary evidence, including but not limited to records showing that Luis Sanchez-Valle is not a licensed dealer of firearms and the tracing of the FM pistol to demonstrate that it traveled in interstate commerce. As well as the testimony of the police of Puerto Rico undercover agent, the ATF case agents, and forensic expert witnesses. Full discovery has been provided to the defendant.

/s/ Carmen M. Marquez-Marin
Assistant U.S. Attorney
Dated: 9/28/09

/s/ Joseph A. Boucher-Martinez
Joseph A. Boucher-Martinez, Esq.
Counsel for Defendant
Dated: 10/9/09

/s/ Luis Sanchez-Valle
Luis Sanchez-Valle
Defendant
Dated: 9/10/09

RECEIVED AND FILED CLERK'S OFFICE U.S. DISTRICT COURT SAN JUAN, PR

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA,

Plaintiff,

v.

1) RAFAEL DELGADO-RODRIGUEZ,
aka Papoline, aka el Gruero,
2) HECTOR GOMEZ-PASTRANA,
aka Trompe,
3) RENE RODRIGUEZ-BETANCOURT,
aka Cano
4) JAIME GOMEZ VAZQUEZ,
aka Pito,

Defendants,

INDICTMENT

Criminal No. 09-253 (DRD)

Violations:
Title 18, *United States Code*, Sections 922(a)(1), 924(d) and 371;
Title 28, *United States Code*, Section 2461(c)

(FIVE COUNTS)

THE GRAND JURY CHARGES:

COUNT ONE

(Dealing firearms without a license)
Title 18, *United States Code*, Sections 922(a)(1)(A), and 371.

From on or about June 2,2008, and continuing thereafter until on or about July 9,2008, in the District of Puerto Rico, and elsewhere, within the jurisdiction of this Court

1) **RAFAEL DELGADO-RODRIGUEZ aka Papolin, aka el Gruero,**
2) **HECTOR GOMEZ-PASTRANA aka Trompe,**
3) **RENE RODRIGUEZ-BETANCOURT aka Cano,**
4) **JAIME GOMEZ VAZQUEZ aka Pito,**

the defendants herein, did knowingly and willfully combine, conspire and agree together and with each other, and with diverse other persons known and unknown to the Grand Jury, to commit an offense against the United States, in that while not being licensed importers, manufacturer or dealers of firearms, as defined in Title 18, *United States Code*, Section 921(a)(3), said defendants did engage in the business of dealing firearms, as defined in Title 18, *United States Code*, Section 921(a)(21) and (22), that is, illegally selling firearms for profit, in violation of Title 18, *United States Code*, Sections 922(a)(1)(A), 923(a) and 924(a)(1)(D), and one or more of said defendants did acts to effect the object of the conspiracy. All in violation of Title 18, *United States Code*, Section 371 and 922(a)(1)(A), 923(a) and 924(a)(1)(D).

OBJECT OF THE CONSPIRACY

It was the object of the conspiracy that co-defendants and co-conspirators,

1) RAFAEL DELGADO-RODRIGUEZ aka Papolin, aka el Gruero, 2) HECTOR GOMEZ-

PASTRANA aka Trompe, 3) RENE RODRIGUEZ-BETANCOURT aka Cano, and 4) JAIME GOMEZ VAZQUEZ aka Pito, would sell firearms for profit while not being licensed to engage in the selling or dealing in firearms.

OVERT ACTS

At places and dates hereinafter mentioned, and in furtherance of the execution of the conspiracy and for the purpose of carrying into effect the objects, design, and purposes of the conspiracy, co-defendants and co-conspirators,

1) **RAFAEL DELGADO-RODRIGUEZ aka Papolin, aka el Gruero,**
2) **HECTOR GOMEZ-PASTRANA aka Trompe**
3) **RENE RODRIGUEZ-BETANCOURT aka Cano,**
4) **JAIME GOMEZ VAZQUEZ aka Pito,**

did do and perform, among others, the following overt acts in the District of Puerto Rico, and elsewhere:

1. On or about June 2,2008, in the municipality of Carolina, Puerto Rico, **1) HECTOR GOMEZ-PASTRANA aka Trompe,** placed a telephone call to a Police of Puerto Rico Undercover Agent, to coordinate the sale of a firearm.

2. On or about June 4, 2008, in the municipality of Carolina, Puerto Rico, **1) RAFAEL DELGADO-RODRIGUEZ aka Papolin, aka el Gruero, 2) HECTOR GOMEZ-PASTRANA aka Trompe,** and **3) RENE RODRIGUEZ-BETANCOURT aka Cano,** and others known and unknown, sold a firearm to a Police of Puerto Rico Undercover Agent,

that is, one (1) Bush Master Rifle, black in color, model unknown, caliber .223, serial number obliterated, and one (1) magazine loaded eighteen (18) rounds of caliber .223 ammunition.

3. On or about June 30, 2008, in the municipality of Carolina, Puerto Rico, **1) RAFAEL DELGADO-RODRIGUEZ aka Papolin, aka el Gruero,** and **2) HECTOR GOMEZ-PASTRANA aka Trompe,** coordinated with a Police of Puerto Rico Undercover Agent the illegal sale of firearms and ammunition.

4. On or about July 3, 2008, in the municipality of Carolina, Puerto Rico, **1) RAFAEL DELGADO-RODRIGUEZ aka Papolin, aka el Gruero,** and **2) HECTOR GOMEZ-PASTRANA aka Trompe,** and others known and unknown, sold a firearm to a Police of Puerto Rico Undercover Agent, that is, one (1) Ruger Rifle, black in color, model Mini-30, caliber 7.62, serial number 196-45798; two (2) empty magazines.

5. On or about July 8,2008, in the municipality of Carolina, Puerto Rico, **1) HECTOR GOMEZ-PASTRANA aka Trompe,** placed a telephone call to a Police of Puerto Rico Undercover Agent, to coordinate the sale of a firearm.

6. On or about July 9, 2008, in the municipality of Carolina, Puerto Rico, **1) RAFAEL DELGADO-RODRIGUEZ aka Papolin, aka el Gruero 2) HECTOR GOMEZ-PASTRANA aka Trompe,** and **4) JAIME GOMEZ-VAZQUEZ aka Pito,** and others known and unknown, sold a firearm to a Police of Puerto Rico Undercover Agent, that is, one (1) Chinese Rifle, black in color, model SKS, caliber 7.62, serial number obliterated.

COUNT TWO

(Dealing in firearms without a license, Aiding and Abetting)

Title 18, *United States Code*, Sections 922(a)(1)(A), 923(a), 924(a)(1)(D) and 2.

On or about June 4, 2008, in the District of Puerto Rico, and elsewhere within the jurisdiction of this Court,

1) **RAFAEL DELGADO-RODRIGUEZ aka Papolin, aka el Gruero,**
2) **HECTOR GOMEZ-PASTRANA aka Trompe,**
3) **RENE RODRIGUEZ-BETANCOURT aka Cano,**

the defendants herein, aiding and abetting each other, not being licensed dealers or importers of firearms within the meaning of Chapter 44, Title 18, *United States Code*, did willfully engage in the business of dealing firearms, that is, said defendants sold one (1) Bush Master Rifle, black in color, model unknown, caliber .223, serial number obliterated, and one (1) magazine loaded eighteen (18) rounds of caliber .223 ammunition, to a Police of Puerto Rico Undercover Agent, which firearm and ammunition had been shipped or transported in interstate or foreign commerce. All in violation of Title 18, *United States Code*, Sections 922(a)(1)(A), 923(a),924(a)(1)(D) and 2.

COUNT THREE

(Dealing in firearms without a license, Aiding and Abetting)

Title 18, *United States Code*, Sections 922(a)(1)(A), 923(a), 924(a)(1)(D) and 2

On or about July 3, 2008, in the District of Puerto Rico, and elsewhere within the jurisdiction of this Court,

1) **RAFAEL DELGADO-RODRIGUEZ aka Papolin, aka el Gruero,**

2) **HECTOR GOMEZ-PASTRANA aka Trompe,**

the defendants herein, aiding and abetting each other, not being licensed dealers or importers of firearms within the meaning of Chapter 44, Title 18, *United States Code*, did willfully engage in the business of dealing firearms, that is, said defendants sold, one (1) Ruger Rifle, black in color, model Mini-30, caliber 7.62, serial number 196-45798; two (2) empty magazines, to a Police of Puerto Rico Undercover Agent, which firearm and ammunition had been shipped or transported in interstate or foreign commerce. All in violation of Title 18, *United States Code*, Sections 922(a)(1)(A), 923(a),924(a)(1)(D) and

COUNT FOUR

(Dealing in firearms without a license, Aiding and Abetting)

Title 18, *United States Code*. Sections 922(a)(1)(A), 923(a), 924(a)(1)(D) and 2

On or about July 9, 2008, in the District of Puerto Rico, and elsewhere within the jurisdiction of this Court,

1) RAFAEL DELGADO-RODRIGUEZ aka Papolin, aka el Gruero,

2) HECTOR GOMEZ-PASTRANA aka Trompe,

4) JAIME GOMEZ-VAZQUEZ aka Pito,

the defendants herein, aiding and abetting each other, not being licensed dealers or importers of firearms within the meaning of Chapter 44, Title 18, *United States Code*, did willfully engage in the business of dealing firearms, that is, said defendants sold, one (1) Chinese Rifle, black in color, model SKS, caliber 7,62, serial number obliterated, to a Police of Puerto Rico Undercover Agent, which firearm and ammunition had been shipped or transported in interstate or foreign commerce. All in violation of Title 18, *United States Code*, Sections 922(a)(1)(A), 923(a),924(a)(1)(D) and 2.

COUNT FIVE

(Firearms and Ammunition Forfeiture Allegation)

Title 18 *United States Code* Sections 924(d) and Title 28 *United States Code* Section 2461(c)

The allegations contained in Count One through Four of this Indictment are hereby realleged and incorporated by reference for the purpose of alleging forfeitures pursuant to Title 18, *United States Code*, Section 924(d) and Title 28, *United States Code*, Section 2461(c). Upon conviction of the offense in violation of Title 18, *United States Code*, Sections 922(a)(1)(A), 371 and 2, set forth in Count One through Four of this Indictment, the defendants,

1) RAFAEL DELGADO-RODRIGUEZ aka Papolin, aka el Gruero,

2) HECTOR GOMEZ-PASTRANA aka Trompe,

3) RENE RODRIGUEZ-BETANCOURT aka Cano,

4) JAIME GOMEZ VAZQUEZ aka Pito,

shall forfeit to the United States pursuant to Title 18, *United States Code*, Section 924(d) and Title 28, *United States Code*, Section 2461(c), any firearms and ammunition involved or used in furtherance of the commission of the drug trafficking offense, including, but not limited to: one (1) Bush Master Rifle, black in color, model unknown, caliber .223, serial number obliterated, and one (1) magazine loaded with eighteen (18) rounds of caliber .223 ammunition; one (1) Ruger Rifle, black in color, model Mini-30, caliber 7.62, serial number 196-45798; two (2) empty magazines; one (1) Chinese Rifle, black in color, model SKS, caliber 7.62, serial number obliterated;

If any of the property described above, as a result of any act or omission of the defendants:

a. cannot be located upon the exercise of due diligence;

b. has been transferred or sold to, or deposited with, a third party;

c. has been placed beyond the jurisdiction of the court;

d. has been substantially diminished in value; or

e. has been commingled with other property which cannot be divided without difficulty, the United States of America shall be entitled to forfeiture of substitute property pursuant to Title 21, *United States Code*, Section 853(p), as incorporated by Title 28, *United States Code*, Section 2461 (c). All

pursuant to Title 18, *United States Code*, Section 924(d) and Title 28, *United States Code*, Section 2461(c).

TRUE BILL

ROSA EMILIA RODRIGUEZ-VELEZ
United States Attorney

Date: 7/28/09

/s/ José Ruiz-Santiago
José Ruiz-Santiago
Assistant United States Attorney
Chief, Criminal Division

/s/ Warren Vazquez
Warren Vazquez
Chief, Violent Crimes Unit

/s/ Carmen M. Marquez
Carmen M. Marquez
Assistant United States Attorney

RECEIVED AND
FILED
MARCH 18, 2010
PM 0:30

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA,

Plaintiff,

v.

JAIME GOMEZ-VAZQUEZ,

Defendant.

CRIMINAL NO. 09-253 (DRD)

PLEA AGREEMENT

(Pursuant to Rule 11(c)(1)(A) & (C) of the Federal Rules of Criminal Procedure)

TO THE HONORABLE COURT:

COMES NOW the United States of America, by and through its attorneys, Rosa Emilia Rodriguez-Velez, United States Attorney for the District of Puerto Rico, Jose A. Ruiz-Santiago, Assistant United States Attorney, Chief of the Criminal Division, Warren Vázquez, Assistant United States Attorney, Chief of the Violent Crimes Unit, and Carmen M. Marquez, Assistant United States Attorney, and Jaime Gomez-Vazquez, Defendant, by and through defendant's counsel, Teodora Mendez-Lebron, pursuant to Rule 11(c)(1)(A) and (C) of the Federal Rules of Criminal Procedure and Local Rule 111, state to this Honorable Court, that they have reached an agreement, the terms and conditions of which are as follows:

I. COUNTS TO WHICH DEFENDANT PLEADS GUILTY

The defendant agrees to plead guilty to Counts One and Five of the Indictment.

Count One charges that from on or about June 2, 2008, and continuing thereafter until on or about July 9, 2008, in the District of Puerto Rico, and elsewhere, within the jurisdiction of this Court **1) RAFAEL DELGADO-RODRIGUEZ aka Papolin, aka el Gruero, 2) HECTOR GOMEZ-PASTRANA aka Trompe, 3) RENE RODRIGUEZ-BETANCOURT aka Cano,** and **4) JAIME GOMEZ VAZQUEZ aka Pito,** the defendants herein, did knowingly and willfully combine, conspire and agree together and with each other, and with diverse other persons known and unknown to the Grand Jury, to commit an offense against the United States, in that while not being licensed importers, manufacturer or dealers of firearms, as defined in Title 18, *United States Code*, Section 921(a)(3), said defendants did engage in the business of dealing firearms, as defined in Title 18, *United States Code*, Section 921(a)(21) and (22), that is, illegally selling firearms for profit, in violation of Title 18, *United States Code*, Sections 922(a)(1)(A), 923(a) and 924(a)(1)(D), and one or more of said defendants did acts to effect the object of the conspiracy. All in violation of Title 18, *United States Code*, Section 371 and 922(a)(1)(A), 923(a) and 924(a)(1)(D).

Count Five is a firearms and ammunition forfeiture allegation pursuant to Title 18, *United States Code*, Section 924(d), and Title 28, *United States Code*, Section 2461(c).

By accepting **Count Five** and as part of this agreement the defendant stipulates, acknowledges and agrees to forfeit to the United States all right, title, and interest in any firearms and ammunition involved or used in furtherance of the commission of the offense enumerated in Count One, including, but not limited to: one (1) Bush Master Rifle, black in color, model unknown, caliber .223, serial number obliterated, and one (1) magazine loaded with eighteen (18) rounds of caliber .223 ammunition; one (1) Ruger Rifle, black in color, model Mini-30, caliber 7.62, serial number 196-45798; two (2) empty magazines; one (1) Chinese Rifle, black in color, model SKS, caliber 7,62, serial number obliterated;

If any of the property described above, as a result of any act or omission of the defendants:

a. cannot be located upon the exercise of due diligence;

b. has been transferred or sold to, or deposited with, a third party;

c. has been placed beyond the jurisdiction of the court;

d. has been substantially diminished in value; or

e. has been commingled with other property which cannot be divided without difficulty, the United States of America shall be entitled to forfeiture of substitute property pursuant to Title 21, *United States Code*, Section 853(p), as incorporated by Title 28, *United States Code*, Section 2461(c). All pursuant to Title 18, *United States Code*, Section 924(d) and Title 28, *United States Code*, Section 2461(c).

II. STATUTORY PENALTIES

The penalty for the offense charged in Count One of the Indictment is a term of imprisonment of not more than five (5) years and a fine not to exceed $250,000.00, a term of supervised release of not more than three (3) years, all pursuant to Title 18, *United States Code*, Section 924(a)(1)(D),

III. APPLICABILITY OF UNITED STATES SENTENCING GUIDELINES

The defendant is aware that pursuant *United States v. Booker*, 543 U.S. 220 (2005), the United States Sentencing Commission Guidelines Manual ("Sentencing Guidelines") is no longer mandatory and is now advisory. The defendant acknowledges that the Court may impose a sentence in accordance with the applicable provision(s) of the Sentencing Guidelines and Title 18, *United States Code*, Section 3551. The defendant is further aware that parole has been abolished and that the imposition of sentence may not be suspended.

IV. SPECIAL MONETARY ASSESSMENT

The defendant agrees to pay a special monetary assessment of one hundred dollars ($100.00), per count of conviction, to be deposited in the Crime Victim Fund, pursuant to Title 18, *United States Code*, Section 3013.

V. FINES AND RESTITUTION

The defendant is aware that the Court may, pursuant to Section 5E1.2 of the Sentencing Guidelines, order the defendant to pay a fine sufficient to reimburse the government for the costs

of any imprisonment, probation or supervised release ordered and may impose restitution. As part of this Plea Agreement, the defendant agrees to produce complete information regarding all restitution victims, and agrees to execute a financial statement to the United States (OBD Form 500). The United States will make no recommendations as to the imposition of fines or restitution.

VI. RULE 11(c)(1)(C) WARNINGS

The defendant is aware that his sentence is within the sound discretion of the sentencing judge and the advisory nature of the Sentencing Guidelines—including the Sentencing Guidelines Policy Statements, Application Notes, and Background Notes. The defendant is aware that the Court has jurisdiction and authority to impose any sentence within the statutory maximum set for the offense to which the defendant pleads guilty. The defendant is aware that the court may accept or reject the Plea Agreement, or may defer its decision whether to accept or reject the Plea Agreement until it has considered the presentence report. If the Court rejects the Plea Agreement, the Court shall, on the record, inform the parties of this fact and afford the defendant an opportunity to withdraw the guilty plea, and advise the defendant that if the defendant persists in a guilty plea, the disposition of the case may be less favorable to the defendant than the defendant contemplated in the Plea Agreement. In addition, as part of the terms and conditions of the Plea Agreement, the parties agree that should the Court reject the Plea Agreement, the United States reserves the right to withdraw from its obligations under the Plea Agreement.

VII. SENTENCING GUIDELINE CALCULATIONS

The United States and the defendant agree to the following Sentencing Guidelines calculations:

SENTENCE GUIDELINES CALCULATION-COUNT FOUR	
GUIDELINE SECTION	**LEVELS**
BASE offense level [USSG § 2K2.1(a)(6(A)]	14
Since the firearm had an obliterated serial number [USSG § 2K2.1(b)(4)(B)	+4
Minimal role in the offense	-4
Acceptance of Responsibility [USSG § 3E1.1(a)]	-2
Adjusted Offense Level	12
* * * Stipulation of Criminal History Category III - Since the parties agree that the defendant's criminal history is over represented.	
Applicable Guidelines Range at CHC III	15-21 months of imprisonment

VIII. SENTENCE RECOMMENDATION

The parties agree and recommend that the defendant be sentenced to a term of imprisonment of eighteen (18) months. The defendant agrees to forfeit to the United States all firearms, magazines and ammunition involved in the commission of the offense charged in Count One, as stated in Count Five of the Indictment and in pages two and there of the plea agreement.

IX. NO FURTHER ADJUSTMENTS OR DEPARTURES

The United States and the defendant agree that no further adjustments or departures to the defendant's adjusted offense level or the agreed upon sentence shall be sought by the parties. The parties agree that any request by the defendant for an

adjustment or departure will be considered a material breach of this Plea Agreement. If the defendant's Criminal History Category is different than what the parties originally believed, any request by the defendant for a sentence below the lower end of the applicable guideline range will be considered a material breach of this Plea Agreement.

X. DISMISSAL OF REMAINING COUNTS

Count Four of the Indictment will be dismissed at sentencing.

XI.SATISFACTION WITH COUNSEL

The defendant represents to the Court to be satisfied with counsel, Teodoro Mendez-Lebron, Esquire, and indicates that counsel has rendered effective legal assistance.

XII. RIGHTS SURRENDERED BY DEFENDANT THROUGH GUILTY PLEA

The defendant understands that by entering into this Plea Agreement he surrenders certain rights as provided in this agreement. The defendant understands that the rights of criminal defendants include the following:

a) If the defendant had persisted in a plea of not guilty to the charges, the defendant would have had the right to a speedy jury trial with the assistance of counsel. The trial may be conducted by a judge sitting without a jury if the defendant, the United States and the judge agree.

b) If a jury trial is conducted, the jury would be composed of twelve lay persons selected at random. The defendant and the defendant's

attorney would assist in selecting the jurors by removing prospective jurors for cause where actual bias or other disqualification is shown, or by removing prospective jurors without cause by exercising peremptory challenges. The jury would have to agree, unanimously, before it could return a verdict of either guilty or not guilty. The jury would be instructed that the defendant is presumed innocent, that it could not convict the defendant unless, after hearing all the evidence, it was persuaded of the defendant's guilt beyond a reasonable doubt, and that it was to consider each charge separately.

c) If a trial is held by the judge without a jury, the judge would find the facts and, after hearing all the evidence and considering each count separately, determine whether or not the evidence established the defendant's guilt beyond a reasonable doubt.

d) At a trial, the United States would be required to present its witnesses and other evidence against the defendant. The defendant would be able to confront those witnesses and defendant's attorney would be able to cross-examine them. In turn, the defendant could present witnesses and other evidence on defendant's own behalf. If the witnesses for the defendant would not appear voluntarily, defendant could require their attendance through the subpoena power of the Court.

e) At a trial, the defendant could rely on the privilege against self-incrimination to decline to testify, and no inference of guilt could be

drawn from the defendant's refusal to testify. If the defendant desired to do so, the defendant could testify on the defendant's own behalf.

XIII. STIPULATION OF FACTS

The accompanying Stipulation of Facts signed by the defendant is hereby incorporated into this Plea Agreement. The defendant adopts the Stipulation of Facts and agrees that the facts therein are accurate in every respect and, had the matter proceeded to trial, the United States would have proven those facts beyond a reasonable doubt.

XIV. LIMITATIONS OF PLEA AGREEMENT

This Plea Agreement binds only the United States Attorney's Office for the District of Puerto Rico and the defendant; it does not bind any other federal district, state or local authority.

XV. AMENDMENTS TO PLEA AGREEMENT

No other promises, terms, or conditions will be entered into unless in writing and signed by all parties.

XVI. WAIVER OF APPEAL

The defendant hereby agrees that if this Honorable Court accepts this Plea Agreement and sentences the defendant according to its terms, conditions, and recommendations, the defendant waives and surrenders his right to appeal the judgment and sentence in this case.

XVII. VOLUNTARINESS OF GUILTY PLEA

The defendant acknowledges that no threats have been made against him and that he is pleading guilty freely and voluntarily because he is guilty.

ROSA EMILIA RODRIGUEZ-VELEZ
United States Attorney

/s/ José Ruíz Santiago
José Ruíz Santiago
Assistant U.S. Attorney
Chief, Criminal Division
Dated: 3/15/10

/s/ Warren Vázquez
Warren Vázquez
Assistant U.S. Attorney
Chief, Violent Crimes Unit
Date: 3/15/10

/s/ Carmen M. Marquez-Marin
Assistant U.S. Attorney
Dated: 3/16/10

/s/ Teodoro Mendez-Lebron
Teodoro Mendez-Lebron, Esq.
Counsel for Defendant
Dated: 3/18/10

/s/ Jaime Gomez-Vazquez
Jaime Gomez-Vazquez
Defendant
Dated: 3/18/10

I have consulted with my counsel and fully understand all of my rights with respect to the Indictment pending against me. Furthermore, I have consulted with my attorney and fully understand my rights with respect to the provisions of the Sentencing Guidelines, including the Sentencing Guidelines Policy Statements, Application Notes, and Background Notes, which may apply in my case. I have read this Plea Agreement and carefully reviewed every part of it with my attorney. I fully understand this agreement and I voluntarily agree to it.

Date: 3/18/10 */s/ Jaime Gomez-Vazquez*
Jaime Gomez-Vazquez
Defendant

I am the attorney for the defendant and I have fully explained defendant's rights to the defendant with respect to the pending Indictment. Furthermore, I have reviewed the provisions of the Sentencing Guidelines, including the Sentencing Guidelines Policy Statements, Application Notes, and Background Notes, and have fully explained to the defendant the provisions of those guidelines which may apply in this case. I have carefully reviewed every part of this Plea Agreement with the defendant and, to my knowledge, the defendant is entering into this agreement voluntarily, intelligently and with full knowledge of all consequences of defendant's plea of guilty.

Date: 3/18/10 */s/ Teodoro Mendez-Lebron*
Teodoro Mendez-Lebron, Esq.
Counsel for Defendant

STIPULATION OF FACTS

In conjunction with the submission of the accompanying Plea Agreement in this case, and pursuant to Local Rule 418.2(A), the United States of America and the defendant, Jaime Gomez-Vazquez, agree that the following recitals provide a true and accurate summary of the facts leading to the defendant's acceptance of criminal responsibility for knowingly and unlawfully conspiring to sell firearms without a license to wit: On or about July 9, 2008, in Carolina, Puerto Rico, JAIME GOMEZ-VAZQUEZ, aka Pito, and others, sold a firearm to a Police of Puerto Rico Undercover Agent, that is, one (1) Chinese Rifle, black in color, model SKS, caliber 7.62, serial number obliterated.

At trial, the United States would have proven beyond a reasonable doubt that the defendant, Jaime Gomez-Vazquez, is guilty as charged in Count One of the Indictment by producing the Rifle, video recordings and photographs of the transaction, documents to prove that none of the defendants are duly license to sell firearms and documents to prove that the rifle traveled in foreign or interstate commerce. As well as the testimony of the undercover agent, the ATF case agents and forensic expert witnesses.

/s/ Carmen M. Marquez-Marin
Assistant U.S. Attorney
Dated: 3/16/10

/s/ Jaime Gomez-Vazquez
Jaime Gomez-Vazquez
Defendant
Dated: 3/18/10

/s/ Teodoro Mendez-Lebron
Teodoro Mendez-Lebron, Esq.
Counsel for Defendant
Dated: 3/18/10

Treaty of Peace between the United States of America and the Kingdom of Spain.

Signed at Paris, December 10, 1898;
Ratification advised by the Senate, February 6, 1899;
Ratified by the President, February 6, 1899;
Ratified by her Majesty the Queen Regent of Spain, March 19, 1899; Ratifications exchanged at Washington, April 11, 1899;
Proclaimed, Washington, April 11, 1899.

THE UNITED STATES OF AMERICA AND HER MAJESTY THE QUEEN REGENT OF SPAIN, IN THE NAME OF HER AUGUST SON DON ALFONSO XIII, desiring to end the state of war now existing between the two countries, have for that purpose appointed as Plenipotentiaries:

THE PRESIDENT OF THE UNITED STATES,

WILLIAM R. DAY, CUSHMAN K. DAVIS, WILLIAM P FRYE, GEORGE GRAY, and WHITELAW REID, citizens of the United States;

AND HER MAJESTY THE QUEEN REGENT OF SPAIN,

DON EUGENIO MONTERO RÍOS, President of the Senate,

DON BUENAVENTURA DE ABARZUZA, Senator of the Kingdom and ex-Minister of the Crown,

DON JOSÉ DE GARNICA, Deputy to the Cortes and Associate Justice of the Supreme Court;

DON WENCESLAO RAMIREZ DE VILLA-URRUTIA, Envoy Extraordinary and Minister Plenipotentiary at Brussels, and DON RAFAEL CERERO, General of Division;

Who, having assembled in Paris, and having exchanged their full powers, which were found to be in due and proper form, have, after discussion of the matters before them, agreed upon the following articles:

ARTICLE I.

Spain relinquishes all claim of sovereignty over and title to Cuba.

And as the island is, upon its evacuation by Spain, to be occupied by the United States, the United States will, so long as such occupation shall last, assume and discharge the obligations that may under international law result from the fact of its occupation, for the protection of life and property.

ARTICLE II.

Spain cedes to the United States the island of Porto Rico and other islands now under Spanish sovereignty in the West Indies, and the island of Guam in the Marianas or Ladrones.

ARTICLE III.

Spain cedes to the United States the archipelago known as the Philippine Islands, and comprehending the islands lying within the following line:

A line running from west to east along or near the twentieth parallel of north latitude, and through the middle of the navigable channel of Bachi, from the one hundred and eighteenth (118th) to the one hundred and twenty seventh (127th) degree meridian of longitude cast of Greenwich, thence along the one hundred and twenty seventh (127th) degree meridian of longitude east of Greenwich to the parallel of four degrees and forty five minutes (4°

45') north latitude, thence along the parallel of four degrees and forty five minutes (4° 45') north latitude to its intersection with the meridian of longitude one hundred and nineteen degrees and thirty five minutes (119° 35') east of Greenwich, thence along the meridian of longitude one hundred and nineteen degrees and thirty five minutes (119° 35') east of Greenwich to the parallel of latitude seven degrees and forty minutes (7° 40') north, thence along the parallel of latitude seven degrees and forty minutes (7° 40') north to its intersection with the one hundred and sixteenth (116th) degree meridian of longitude east of Greenwich, thence by a direct line to the intersection of the tenth (10th) degree parallel of north latitude with the one hundred and eighteenth (118th) degree meridian of longitude east of Greenwich, and thence along the one hundred and eighteenth (118th) degree meridian of longitude east of Greenwich to the point of beginning.

The United States will pay to Spain the sum of twenty million dollars ($20,000,000) within three months after the exchange of the ratifications of the present treaty.

ARTICLE IV

The United States will, for the term of ten years from the date of the exchange of the ratifications of the present treaty, admit Spanish ships and merchandise to the ports of the Philippine Islands on the same terms as ships and merchandise of the United States.

ARTICLE V.

The United States will, upon the signature of the present treaty, send back to Spain, at its own cost,

the Spanish soldiers taken as prisoners of war on the capture of Manila by the American forces. The arms of the soldiers in question shall be restored to them.

Spain will, upon the exchange of the ratifications of the present treaty, proceed to evacuate the Philippines, as well as the island of Guam, on terms similar to those agreed upon by the Commissioners appointed to arrange for the evacuation of Porto Rico and other islands in the West Indies, under the Protocol of August 12, 1898, which is to continue in force till its provisions are completely executed.

The time within which the evacuation of the Philippine Islands and Guam shall be completed shall be fixed by the two Governments. Stands of colors, uncaptured war vessels, small arms, guns of all calibres, with their carriages and accessories, powder, ammunition, live stock, and materials and supplies of all kinds, belonging to the land and naval forces of Spain in the Philippines and Guam, remain the property of Spain. Pieces of heavy ordnance, exclusive of field artillery, in the fortifications and coast defences, shall remain in their emplacements for the term of six months, to be reckoned from the exchange of ratifications of the treaty; and the United States may, in the mean time, purchase such material from Spain, if a satisfactory agreement between the two Governments on the subject shall be reached.

ARTICLE VI.

Spain will, upon the signature of the present treaty, release all prisoners of war, and all persons detained or imprisoned for political offences, in connection with the insurrections in Cuba and the Philippines and the war with the United States.

Reciprocally, the United States will release all persons made prisoners of war by the American forces, and will undertake to obtain the release of all Spanish prisoners in the hands of the insurgents in Cuba and the Philippines.

The Government of the United States will at its own cost return to Spain and the Government of Spain will at its own cost return to the United States, Cuba, Porto-Rico, and the Philippines, according to the situation of their respective homes, prisoners released or caused to be released by them, respectively, under this article.

ARTICLE VII.

The United States and Spain mutually relinquish all claims for indemnity, national and individual, of every kind, of either Government, or of its citizens or subjects, against the other Government, that may have arisen since the beginning of the late insurrection in Cuba and prior to the exchange of ratifications of the present treaty, including all claims for indemnity for the cost of the war.

The United States will adjudicate and settle the claims of its citizens against Spain relinquished in this article.

ARTICLE VIII.

In conformity with the provisions of Articles I, II, and III of this treaty, Spain relinquishes in Cuba, and cedes in Porto Rico and other islands in the West Indies, in the island of Guam, and in the Philippine Archipelago, all the buildings, wharves, barracks, forts, structures, public highways and other immovable property which, in conformity with law,

belong to the public domain, and as such belong to the Crown of Spain.

And it is hereby declared that the relinquishment or cession, as the case may be, to which the preceding paragraph refers, cannot in any respect impair the property or rights which by law belong to the peaceful possession of property of all kinds, of provinces, municipalities, public or private establishments, ecclesiastical or civic bodies, or any other associations having legal capacity to acquire and possess property in the aforesaid territories renounced or ceded, or of private individuals, of whatsoever nationality such individuals may be.

The aforesaid relinquishment or cession, as the case may be, includes all documents exclusively referring to the sovereignty relinquished or ceded that may exist in the archives of the Peninsula. Where any document in such archives only in part relates to said sovereignty, a copy of such part will be furnished whenever it shall be requested. Like rules shall be reciprocally observed in favor of Spain in respect of documents in the archives of the islands above referred to.

In the aforesaid relinquishment or cession, as the case may be, are also included such rights as the Crown of Spain and its authorities possess in respect of the official archives and records, executive as well as judicial, in the islands above referred to, which relate to said islands or the rights and property of their inhabitants. Such archives and records shall be carefully preserved, and private persons shall without distinction have the right to require, in accordance with law, authenticated copies of the contracts, wills and other instruments forming part

of notarial protocols or files, or which may be contained in the executive or judicial archives, be the latter in Spain or in the islands aforesaid.

ARTICLE IX.

Spanish subjects, natives of the Peninsula, residing in the territory over which Spain by the present treaty relinquishes or cedes her sovereignty, may remain in such territory or may remove therefrom, retaining in either event all their rights of property, including the right to sell or dispose of such property or of its proceeds; and they shall also have the right to carry on their industry, commerce and professions, being subject in respect thereof to such laws as are applicable to other foreigners. In case they remain in the territory they may preserve their allegiance to the Crown of Spain by making, before a court of record, within a year from the date of the exchange of ratifications of this treaty, a declaration of their decision to preserve such allegiance; in default of which declaration they shall be held to have renounced it and to have adopted the nationality of the territory in which they may reside.

The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress.

ARTICLE X.

The inhabitants of the territories over which Spain relinquishes or cedes her sovereignty shall be secured in the free exercise of their religion.

ARTICLE XI.

The Spaniards residing in the territories over which Spain by this treaty cedes or relinquishes her sovereignty shall be subject in matters civil as well

as criminal to the jurisdiction of the courts of the country wherein they reside, pursuant to the ordinary laws governing the same; and they shall have the right to appear before such courts, and to pursue the same course as citizens of the country to which the courts belong.

ARTICLE XII.

Judicial proceedings pending at the time of the exchange of ratifications of this treaty in the territories over which Spain relinquishes or cedes her sovereignty shall be determined according to the following rules:

1. Judgments rendered either in civil suits between private individuals, or in criminal matters, before the date mentioned, and with respect to which there is no recourse or right of review under the Spanish law, shall be deemed to be final, and shall be executed in due form by competent authority in the territory within which such judgments should be carried out.

2. Civil suits between private individuals which may on the date mentioned be undetermined shall be prosecuted to judgment before the court in which they may then be pending or in the court that may be substituted therefor.

3. Criminal actions pending on the date mentioned before the Supreme Court of Spain against citizens of the territory which by this treaty ceases to be Spanish shall continue under its jurisdiction until final judgment; but, such judgment having been rendered, the execution thereof shall be committed to the competent authority of the place in which the case arose.

ARTICLE XIII.

The rights of property secured by copyrights and patents acquired by Spaniards in the Island of Cuba, and in Porto Rico, the Philippines and other ceded territories, at the time of the exchange of the ratifications of this treaty, shall continue to be respected. Spanish scientific, literary and artistic works, not subversive of public order in the territories in question, shall continue to be admitted free of duty into such territories, for the period of ten years, to be reckoned from the date of the exchange of the ratifications of this treaty.

ARTICLE XIV.

Spain shall have the power to establish consular officers in the ports and places of the territories, the sovereignty over which has been either relinquished or ceded by the present treaty.

ARTICLE XV.

The Government of each country will, for the term of ten years, accord to the merchant vessels of the other country the same treatment in respect of all port charges, including entrance and clearance dues, light dues, and tonnage duties, as it accords to its own merchant vessels, not engaged in the coastwise trade.

This article may at any time be terminated on six months' notice given by either Government to the other.

ARTICLE XVI.

It is understood that any obligations assumed in this treaty by the United States with respect to Cuba are limited to the time of its occupancy thereof; but it

will upon the termination of such occupancy, advise any Government established in the island to assume the same obligations.

ARTICLE XVII

The present treaty shall be ratified by the President of the United States, by and with the advice and consent of the Senate thereof, and by Her Majesty the Queen Regent of Spain; and the ratifications shall be exchanged at Washington within six months from the date hereof, or earlier if possible.

In faith whereof, we, the respective Plenipotentiaries, have signed this treaty and have hereunto affixed our seals.

Done in duplicate at Paris, the tenth day of December, in the year of Our Lord one thousand eight hundred and ninety eight.

[SEAL]
WILLIAM R. DAY
[SEAL]
CUSHMAN K. DAVIS
[SEAL]
WM P FRYE
[SEAL]
GEO. GRAY
[SEAL]
WHITELAW REID.
[SEAL]
EUGENIO MONTERO RÍOS
[SEAL]
B. DE ABARZUZA
[SEAL]
J. DE GARNICA

[SEAL]
W R DE VILLA URRUTIA
[SEAL]
RAFAEL CERERO

And whereas, the said Convention has been duly ratified on both parts, and the ratifications of the two Governments were exchanged in the City of Washington, on the eleventh day of April, one thousand eight hundred and ninety-nine;

Now, therefore, be it known that I, William McKinley, President of the United States of America, have caused the said Convention to be made public, to the end that the same and every article and clause thereof may be observed and fulfilled with good faith by the United States and the citizens thereof.

In witness whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the City of Washington, this eleventh day of April, in the year of Our Lord one thousand eight hundred and ninety-nine, and of the Independence of the United States the one hundred and twenty-third.

[SEAL.]
WILLIAM MCKINLEY

By the President:
JOHN HAY

Secretary of State.

CHAP. 191.—An Act Temporarily to provide revenues and civil government for Porto Rico, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That the provisions of this Act shall apply to the island of Porto Rico and to the adjacent islands and waters of the islands lying east of the seventy-fourth meridian of longitude west of Greenwich, which were ceded to the United States by the Government of Spain by treaty entered into on the tenth day of December, eighteen hundred and ninety-eight; and the name Porto Rico, as used in this Act, shall be held to include not only the island of that name, but all the adjacent islands as aforesaid.

SEC. 2. That on and after the passage of this Act the same tariffs, customs, and duties shall be levied, collected, and paid upon all articles imported into Porto Rico from ports other than those of the United States which are required by law to be collected upon articles imported into the United States from foreign countries: *Provided,* That on all coffee in the bean or ground imported into Porto Rico there shall be levied and collected a duty of five cents per pound, any law or part of law to the contrary notwithstanding: *And provided further*, That all Spanish scientific, literary, and artistic works, not subversive of public order in Porto Rico, shall be admitted free of duty into Porto Rico for a period of ten years, reckoning from the eleventh day of April, eighteen hundred and ninety-nine, as provided in said treaty of peace between the United States and Spain: *And provided further,* That all books and pamphlets printed in the English

language shall be admitted into Porto Rico free of duty when imported from the United States.

SEC. 3. That on and after the passage of this Act all merchandise coming into the United States from Porto Rico and coming into Porto Rico from the United States shall be entered at the several ports of entry upon payment of fifteen per centum of the duties which are required to be levied, collected, and paid upon like articles of merchandise imported from foreign countries; and in addition thereto upon articles of merchandise of Porto Rican manufacture coming into the United States and withdrawn for consumption or sale upon payment of a tax equal to the internal-revenue tax imposed in the United States upon the like articles of merchandise of domestic manufacture; such tax to be paid by internal-revenue stamp or stamps to be purchased and provided by the Commissioner of Internal Revenue and to be procured from the collector of internal revenue at or most convenient to the port of entry of said merchandise in the United States, and to be affixed under such regulations as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe; and on all articles of merchandise of United States manufacture coming into Porto Rico in addition to the duty above provided upon payment of a tax equal in rate and amount to the internal-revenue tax imposed in Porto Rico upon the like articles of Porto Rican manufacture: *Provided,* That on and after the date when this Act shall take effect, all merchandise and articles, except coffee, not dutiable under the tariff laws of the United States, and all merchandise and articles entered in Porto Rico free of duty under orders heretofore made by the

Secretary of War, shall be admitted into the several ports thereof, when imported from the United States, free of duty, all laws or parts of laws to the contrary notwithstanding; and whenever the legislative assembly of Porto Rico shall have enacted and put into operation a system of local taxation to meet the necessities of the government of Porto Rico, by this Act established, and shall by resolution duly passed so notify the President, he shall make proclamation thereof, and thereupon all tariff duties on merchandise and articles going into Porto Rico from the United States or coming into the United States from Porto Rico shall cease, and from and after such date all such merchandise and articles shall be entered at the several ports of entry free of duty; and in no event shall any duties be collected after the first day of March, nineteen hundred and two, on merchandise and articles going into Porto Rico from the United States or coming into the United States from Porto Rico.

SEC. 4. That the duties and taxes collected in Porto Rico in pursuance of this Act, less the cost of collecting the same, and the gross amount of all collections of duties and taxes in the United States upon articles of merchandise coming from Porto Rico, shall not be covered into the general fund of the Treasury, but shall be held as a separate fund, and shall be placed at the disposal of the President to be used for the government and benefit of Porto Rico until the government of Porto Rico herein provided for shall have been organized, when all moneys theretofore collected under the provisions hereof, then unexpended, shall be transferred to the local treasury of Porto Rico, and the Secretary of the Treasury shall designate the several ports and sub-

ports of entry in Porto Rico and shall make such rules and regulations and appoint such agents as may be necessary to collect the duties and taxes authorized to be levied, collected, and paid in Porto Rico by the provisions of this Act, and he shall fix the compensation and provide for the payment thereof of all such officers, agents, and assistants as he may find it necessary to employ to carry out the provisions hereof: *Provided, however*, That as soon as a civil government for Porto Rico shall have been organized in accordance with the provisions of this Act and notice thereof shall have been given to the President he shall make proclamation thereof, and thereafter all collections of duties and taxes in Porto Rico under the provisions of this Act shall be paid into the treasury of Porto Rico, to be expended as required by law for the government and benefit thereof instead of being paid into the Treasury of the United States.

SEC. 5. That on and after the day when this Act shall go into effect all goods, wares, and merchandise previously imported from Porto Rico, for which no entry has been made, and all goods, wares, and merchandise previously entered without payment of duty and under bond for warehousing, transportation, or any other purpose, for which no permit of delivery to the importer or his agent has been issued, shall be subjected to the duties imposed by this Act, and to no other duty, upon the entry or the withdrawal thereof: *Provided*, That when duties are based upon the weight of merchandise deposited in any public or private bonded warehouse said duties shall be levied and collected upon the weight of such merchandise at the time of its entry.

GENERAL PROVISIONS.

SEC. 6. That the capital of Porto Rico shall be at the city of San Juan and the seat of government shall be maintained there.

SEC. 7. That all inhabitants continuing to reside therein who were Spanish subjects on the eleventh day of April, eighteen hundred and ninety-nine, and then resided in Porto Rico, and their children born subsequent thereto, shall be deemed and held to be citizens of Porto Rico, and as such entitled to the protection of the United States, except such as shall have elected to preserve their allegiance to the Crown of Spain on or before the eleventh day of April, nineteen hundred, in accordance with the provisions of the treaty of peace between the United States and Spain entered into on the eleventh day of April, eighteen hundred and ninety-nine; and they, together with such citizens of the United States as may reside in Porto Rico, shall constitute a body politic under the name of The People of Porto Rico, with governmental powers as hereinafter conferred, and with power to sue and be sued as such.

SEC. 8. That the laws and ordinances of Porto Rico now in force shall continue in full force and effect, except as altered, amended, or modified hereinafter, or as altered or modified by military orders and decrees in force when this Act shall take effect, and so far as the same are not inconsistent or in conflict with the statutory laws of the United States not locally inapplicable, or the provisions hereof, until altered, amended, or repealed by the legislative authority hereinafter provided for Porto Rico or by Act of Congress of the United States: *Provided,* That so much of the law which was in force

at the time of cession, April eleventh, eighteen hundred and ninety-nine, forbidding the marriage of priests, ministers, or followers of any faith because of vows they may have taken, being paragraph four, article eighty-three, chapter three, civil code, and which was continued by the order of the secretary of justice of Porto Rico, dated March seventeenth, eighteen hundred and ninety-nine, and promulgated by Major-General Guy v. Henry, United States Volunteers, is hereby repealed and annulled, and all persons lawfully married in Porto Rico shall have all the rights and remedies conferred by law upon parties to either civil or religious marriages: *And provided further*, That paragraph one, article one hundred and five, section four, divorce, civil code, and paragraph two, section nineteen, of the order of the minister of justice of Porto Rico, dated March seventeenth, eighteen hundred and ninety-nine, and promulgated by Major-General Guy v. Henry, United States Volunteers, be, and the same hereby are, so amended as to read: "Adultery on the part of either the husband or the wife."

SEC. 9. That the Commissioner of Navigation shall make such regulations, subject to the approval of the Secretary of the Treasury, as he may deem expedient for the nationalization of all vessels owned by the inhabitants of Porto Rico on the eleventh day of April, eighteen hundred and ninety-nine, and which continued to be so owned up to the date of such nationalization, and for the admission of the same to all the benefits of the coasting trade of the United States; and the coasting trade between Porto Rico and the United States shall be regulated in accordance with the provisions of law applicable to

such trade between any two great coasting districts of the United States.

SEC. 10. That quarantine stations shall be established at such places in Porto Rico as the Supervising Surgeon-General of the Marine-Hospital Service of the United States shall direct, and the quarantine regulations relating to the importation of diseases from other countries shall be under the control of the Government of the United States.

SEC. 11. That for the purpose of retiring the Porto Rican coins now in circulation in Porto Rico and substituting therefor the coins of the United States, the Secretary of the Treasury is hereby authorized to redeem, on presentation in Porto Rico, all the silver coins of Porto Rico known as the peso and all other silver and copper Porto Rican coins now in circulation in Porto Rico, not including any such coins that may be imported into Porto Rico after the first day of February, nineteen hundred, at the present established rate of sixty cents in the coins of the United States for one peso of Porto Rican coin, and for all minor or subsidiary coins the same rate of exchange shall be applied. The Porto Rican coins so purchased or redeemed shall be recoined at the expense of the United States, under the direction of the Secretary of the Treasury, into such coins of the United States now authorized by law as he may direct, and from and after three months after the date when this Act shall take effect no coins shall be a legal tender, in payment of debts thereafter contracted, for any amount in Porto Rico, except those of the United States; and whatever sum may be required to carry out the provisions hereof, and to pay all expenses that may be incurred in connection

therewith, is hereby appropriated, and the Secretary of the Treasury is hereby authorized to establish such regulations and employ such agencies as may be necessary to accomplish the purposes hereof: *Provided, however,* That all debts owing on the date when this Act shall take effect shall be payable in the coins of Porto Rico now in circulation, or in the coins of the United States at the rate of exchange above named.

SEC. 12. That all expenses that may be incurred on account of the government of Porto Rico for salaries of officials and the conduct of their offices and departments, and all expenses and obligations contracted for the. internal improvement or development of the island, not, however, including defenses, barracks, harbors, light-houses, buoys, and other works undertaken by the United States, shall be paid by the treasurer of Porto Rico out of the revenues in his custody.

SEC. 13. That all property which may have been acquired in Porto Rico by the United States under the cession of Spain in said treaty of peace in any public bridges, road houses, water powers, highways, unnavigable streams, and the beds thereof, subterranean waters, mines, or minerals under the surface of private lands, and all property which at the time of the cession belonged, under the laws of Spain then in force, to the various harbor-works boards of Porto Rico, and all the harbor shores, docks, slips, and reclaimed lands, but not including harbor areas of navigable waters, is hereby placed under the control of the government established by this Act to be administered for the benefit of the people of Porto Rico; and the legislative assembly

hereby created shall have authority, subject to the limitations imposed upon all its acts, to legislate with respect to all such matters as it may deem advisable.

SEC. 14. That the statutory laws of the United States not locally inapplicable, except as hereinbefore or hereinafter otherwise provided, shall have the same force and effect in Porto Rico as in the United States, except the internal-revenue laws, which, in view of the provisions of section three, shall not have force and effect in Porto Rico.

SEC. 15. That the legislative authority hereinafter provided shall have power by due enactment to amend, alter, modify, or repeal any law or ordinance, civil or criminal, continued in force by this Act, as it may from time to time see fit.

SEC. 16. That all judicial process shall run in the name of "United States of America, ss: the President of the United States," and all criminal or penal prosecutions in the local courts shall be conducted in the name and by the authority of "The people of Porto Rico;" and all officials authorized by this Act shall before entering upon the duties of their respective offices take an oath to support the Constitution of the United States and the laws of Porto Rico.

THE GOVERNOR.

SEC. 17. That the official title of the chief executive officer shall be "The Governor of Porto Rico." He shall be appointed by the President, by and with the advice and consent of the Senate; he shall hold his office for a term of four years and until his successor is chosen and qualified unless sooner

removed by the President; he shall reside in Porto Rico during his official incumbency, and shall maintain his office at the seat of government; he may grant pardons and reprieves, and remit fines and forfeitures for offenses against the laws of Porto Rico, and respites for offenses against the laws of the United States, until the decision of the President can be ascertained; he shall commission all officers that he may be authorized to appoint, and may veto any legislation enacted, as hereinafter provided; he shall be the commander in chief of the militia, and shall at all times faithfully execute the laws, and he shall in that behalf have all the powers of governors of the Territories of the United States that are not locally inapplicable; and he shall annually, and at such other times as he may be required, make official report of the transactions of the government in Porto Rico, through the Secretary of State, to the President of the United States: *Provided,* That the President may, in his discretion, delegate and assign to him such executive duties and functions as may in pursuance with law be so delegated and assigned.

THE EXECUTIVE COUNCIL.

SEC. 18. That there shall be appointed by the President, by and with the advice and consent of the Senate, for the period of four years, unless sooner removed by the President, a secretary, an attorney-general, a treasurer, an auditor, a commissioner of the interior, and a commissioner of education, each of whom shall reside in Porto Rico during his official incumbency and have the powers and duties hereinafter provided for them, respectively, and who, together with five other persons of good repute, to be also appointed by the President for a like term of

four years, by and with the advice and consent of the Senate, shall constitute an executive council, at least five of whom shall be native inhabitants of Porto Rico, and, in addition to the legislative duties hereinafter imposed upon them as a body, shall exercise such powers and perform such duties as are hereinafter provided for them, respectively, and who shall have power to employ all necessary deputies and assistants for the proper discharge of their duties as such officials and as such executive council.

SEC. 19. That the secretary shall record and preserve minutes of the proceedings of the executive council and the laws enacted by the legislative assembly and all acts and proceedings of the governor, and shall promulgate all proclamations and orders of the governor and all laws enacted by the legislative assembly. He shall, within sixty days after the end of each session of the legislative assembly, transmit "to the President, the President of the Senate, the Speaker of the House of Representatives, and the Secretary of State of the United States one copy each of the laws and journals of such session.

SEC. 20. That in case of the death, removal, resignation, or disability of the governor, or his temporary absence from Porto Rico, the secretary shall exercise all the powers and perform all the duties of the governor during such vacancy, disability, or absence.

SEC. 21. That the attorney-general shall have all the powers and discharge all the duties provided by law for an attorney of a Territory of the United States in so far as the same are not locally inapplicable, and he shall perform such other duties

as may be prescribed by law, and make such reports, through the governor, to the Attorney- General of the United States as he may require, which shall annually be transmitted to Congress.

SEC. 22. That the treasurer shall give bond, approved as to form by the attorney-general of Porto Rico, in such sum as the executive council may require, not less, however, than the sum of one hundred thousand dollars, with surety approved by the governor, and he shall collect and be the custodian of the public funds, and shall disburse the same when appropriated by law, on warrants signed by the auditor and countersigned by the governor, and shall perform such other duties as may be prescribed by law, and make, through the governor, such reports to the Secretary of the Treasury of the United States as he may require, which shall annually be transmitted to Congress.

SEC. 23. That the auditor shall keep full and accurate accounts, showing all receipts and disbursements, and perform such other duties as may be prescribed by law, and make, through the governor, such reports to the Secretary of the Treasury of the United States as he may require, which shall annually be transmitted to Congress.

SEC. 24. That the commissioner of the interior shall superintend all works of a public nature, and shall have charge of all public buildings, grounds, and lands, except those belonging to the United States, and shall execute such requirements as may be imposed by law with respect thereto, and shall perform such other duties as may be prescribed by law, and make such reports through the governor to the Secretary of the Interior of the United States as

he may require, which shall annually be transmitted to Congress.

SEC. 25. That the commissioner of education shall superintend public instruction throughout Porto Rico, and all disbursements on account thereof must be approved by him; and he shall perform such other duties, as may be prescribed by law, and make such reports through the governor as may be required by the Commissioner of Education of the United States, which shall annually be transmitted to Congress.

SEC. 26. That the other five members of the executive council, to be appointed as hereinbefore provided, shall attend all meetings of the executive council and participate in all business of every character that may be transacted by it; and they shall receive as compensation for their services such annual salaries as may be provided by the legislative assembly.

HOUSE OF DELEGATES.

SEC. 27. That all local legislative powers hereby granted shall be vested in a legislative assembly which shall consist of two houses; one the executive council, as hereinbefore constituted, and the other a house of delegates, to consist of thirty-five members elected biennially by the qualified voters as hereinafter provided; and the two house thus constituted shall be designated "The legislative assembly of Porte Rico."

SEC. 28. That for the purposes of such elections Porto Rico shall be divided by the executive council into seven districts, composed of contiguous territory and as nearly equal as may be in population, and

each district shall be entitled to five members of the house of delegates.

ELECTION OF DELEGATES.

SEC. 29. That the first election for delegates shall be held on such date and under such regulations as to ballots and voting as the executive council may prescribe; and at such elections the voters of each legislative district shall choose five delegates to represent them in the house of delegates from the date of their election and qualification until two years from and after the first day of January next ensuing; of all which thirty days' notice shall be given by publication in the Official Gazette, or by printed notices distributed and posted throughout the district, or by both, as the executive council may prescribe. At such elections all citizens of Porto Rico shall be allowed to vote who have been bona fide residents for one year and who possess the other qualifications of voters under the laws and military orders in force on the first day of March, nineteen hundred, subject to such modifications and additional qualifications and such regulations and restrictions as to registration as may be prescribed by the executive council. The house of delegates so chosen shall convene at the capital and organize by the election of a speaker, a clerk, a sergeant-at-arms, and such other officers and assistants as it may require; at such time as may be designated by the executive council; but it shall not continue in session longer than sixty days in any one year, unless called by the governor to meet in .extraordinary session. The enacting clause of the laws shall be, "Be it enacted by the legislative assembly of Porto Rico;" and each member of the house of delegates shall be

paid for his services at the rate of five dollars per day for each day's attendance while the house is in session, and mileage at the rate of ten cents per mile for each mile necessarily traveled each way to and from each session of the legislative assembly.

All future elections of delegates shall be governed by the provisions hereof, so far as they are applicable, until the legislative assembly shall otherwise provide.

SEC. 30. That the house of delegates shall be the sole judge of the elections, returns, and qualifications of its members, and shall have and exercise all the powers with respect to the conduct of its proceedings that usually appertain to parliamentary legislative bodies. No person shall be eligible to membership in the house of delegates who is not twenty-five years of age and able to read and write either the Spanish or the English language, or who is not possessed in his own right of taxable property, real or personal, situated in Porto Rico.

SEC. 31. That all bills may originate in either house, but no bill shall become a law unless it be passed in each house by a majority vote of all the members belonging to such house and be approved by the governor, within ten days thereafter. If, when a bill that has been passed is presented to the governor for signature, he approves the same, he shall sign it, or if not he shall return it, with his objections, to that house in which it originated, which house shall enter his objections at large on its journal, and proceed to reconsider the bill. If, after such reconsideration, two-thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall

likewise be considered, and if approved by two-thirds of that house it shall become a law. But in all such cases the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered upon the journal of each house, respectively. If any bill shall not be returned by the governor within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law in like manner as if he had signed it, unless the legislative assembly by adjournment prevent its return, in which case it shall not be a law: *Provided, however,* That all laws enacted by the legislative assembly shall be reported to the Congress of the United States, which hereby reserves the power and authority, if deemed advisable, to annul the same.

SEC. 32. That the legislative authority herein provided shall extend to all matters of a legislative character not locally inapplicable, including power to create, consolidate, and reorganize the municipalities, so far as may be necessary, and to provide and repeal laws and ordinances therefor; and also the power to alter, amend, modify, and repeal any and all laws and ordinances of every character now in force in Porto Rico, or any municipality or district thereof, not inconsistent with the provisions hereof: *Provided, however,* That all grants of franchises, rights, and privileges or concessions of a pŭblie or quasi-public nature shall be made by the executive council, with the approval of the governor, and all franchises granted in Porto Rico shall be reported to Congress, which hereby reserves the power to annul or modify the same.

THE JUDICIARY.

SEC. 33. That the judicial power shall be vested in the court and tribunals of Porto Rico as already established and now in operation, including municipal courts, under and by virtue of General Orders, Numbered One hundred and eighteen, as promulgated by Brigadier-General Davis, United States Volunteers, August sixteenth, eighteen hundred and ninety-nine, and including also the police courts established by General Orders, Numbered One hundred and ninety-five, promulgated November twenty-ninth, eighteen hundred and ninety-nine, by Brigadier-General Davis, United States Volunteers, and the laws and ordinances of Porto Rico and the municipalities thereof in force, so far as the same are not in conflict herewith, all which courts and tribunals are hereby continued. The jurisdiction of said courts and the form of procedure in them, and the various officials and attaches thereof, respectively, shall be the same as defined and prescribed in and by said laws and ordinances, and said General Orders, Numbered One hundred and eighteen and One hundred and ninety-five, until otherwise provided by law: *Provided, however,* That the chief justice and associate justices of the supreme court and the marshal thereof shall be appointed by the President, by and with the advice and consent of the Senate, and the judges of the district courts shall be appointed by the governor, by and with the advice and consent, of the executive council, and all other officials and attaches of all the other courts shall be chosen as may be directed by the legislative assembly, which shall have authority to legislate from time to time as it may see fit with respect to said courts, and any

others they may deem it advisable to establish, their organization, the number of judges and officials and attaches for each, their jurisdiction, their procedure, and all other matters affecting them.

SEC. 34. That Porto Rico shall constitute a judicial district to be called "the district of Porto, Rico." The President, by and with the advice and consent of the Senate, shall appoint a district judge, a district attorney, and a marshal for said district, each for a term of four years, unless sooner removed by the President. The district court for said district shall be called the district court of the United States for Porto Rico and shall have power to appoint all necessary officials and assistants, including a clerk, an interpreter, and such commissioners as may be necessary, who shall have like power and duties as are exercised and performed by commissioners of the circuit courts of the United States, and shall have, in addition to the ordinary jurisdiction of district courts of the United States, jurisdiction of all cases cognizant in the circuit courts of the United States, and shall proceed therein in the same manner as a circuit court. The laws of the United States relating to appeals, writs of error and certiorari, removal of causes, and other matters and proceedings as between the courts of the United States and the courts of the several States shall govern in such matters and proceedings as between the district court of the United Statesand the courts of Porto Rico. Regular terms of said court shall be held at San Juan, commencing on the second Monday in April and October of each year, and also at Ponce on the second Monday in January of each year, and special terms may be held at Mayaguez at such other stated times as said judge may deem expedient. All

pleadings and proceedings in said court shall be conducted in the English language.

The United States district court hereby established shall be the successor to the United States provisional court established by General; Orders, Numbered Eighty-eight, promulgated by Brigadier-General Davis, United States volunteers, and shall take possession of all records of that court, and take jurisdiction of all cases and proceedings pending therein, and said United States provisional court is hereby discontinued.

SEC. 35. That writs of error and appeals from the final decisions of the supreme court of Porto Rico and the district court of the United States shall be allowed and may be taken to the Supreme Court of the United States in the same manner and under the same regulations and in the same cases as from the supreme courts of the Territories of the United States; and such writs of error and appeal shall be allowed in all cases where the Constitution of the United States, or a treaty thereof, or an Act of Congress is brought in question and the right claimed thereunder is denied; and the supreme and district courts of Porto Rico and the respective judges thereof may grant writs of habeas corpus in all cases in which the same are grantable by the judges of the district and circuit courts of the United States. All such proceedings in the Supreme Court of the United States shall by conducted in the English language.

SEC. 36. That the salaries of all officials of Porto Rico not appointed by the President, including deputies, assistants, and other help, shall be such, and be so paid out of the revenues of Porto Rico, as the executive council shall from time to time

determine: *Provided, however*, That the salary of no officer shall be either increased or diminished during his term of office. The salaries of all officers and all expenses of the offices of the various officials of Porto Rico, appointed as herein provided by the President, including deputies, assistants, and other help, shall also be paid out of the revenues of Porto Rico on the warrant of the auditor, countersigned by the governor.

The annual salaries of the officials appointed by the President, and so to be paid, shall be as follows:

The governor, eight thousand dollars; in addition thereto be shall be entitled to the occupancy of the buildings heretofore used by the chief executive of Porto Rico, with the furniture and effects therein, free of rental.

The secretary, four thousand dollars.

The attorney-general, four thousand dollars.

The treasurer, five thousand dollars.

The auditor, four thousand dollars.

The commissioner of the interior, four thousand dollars.

The commissioner of education, three thousand dollars.

The chief justice of the supreme court, five thousand dollars.

The associate justices of the supreme court (each), four thousand five hundred dollars.

The marshal of the supreme court, three thousand dollars.

The United States district judge, five thousand dollars.

The United States district attorney, four thousand dollars.

The United States district marshal, three thousand five hundred dollars.

SEC. 37. That the provisions of the foregoing section shall not apply to the municipal officials. Their salaries and the compensation of their deputies, assistants, and other help, as well as all other expenses incurred by the municipalities, shall be paid out of the municipal revenues in such manner as the legislative assembly shall provide.

SEC. 38. That no export duties shall be levied or collected on exports from Porto Rico; but taxes and assessments on property, and license fees for franchises, privileges, and concessions may be imposed for the purposes of the insular and municipal governments, respectively, as may be provided and defined by act of the legislative assembly; and where necessary to anticipate taxes and revenues, bonds and other obligations may be issued by Porto Rico or any municipal government therein as may be provided by law to provide for expenditures authorized by law, and to protect "the public credit, and to reimburse the United States for any moneys which have been or may be expended out of the emergency fund of the War Department for the relief of the industrial conditions of Porto Rico caused by the hurricane of August eighth, eighteen hundred and ninety-nine: *Provided, however,* That no public indebtedness of Porto Rico or of any municipality thereof shall be authorized or allowed

in excess of seven per centum of the aggregate tax valuation of its property.

SEC. 39. That the qualified voters of Porto Rico shall, on the first Tuesday after the first Monday of November, anno Domini nineteen hundred, and every two years thereafter, choose a resident commissioner to the United States, who shall be entitled to official recognition as such by all Departments, upon presentation to the Department of State of a certificate of election of the governor of Porto Rico, and who shall be entitled to a salary, payable monthly by the United States, at the rate of five thousand dollars per annum: *Provided*, That no person shall be eligible to such election who is not a bona fide citizen of Porto Rico, who is not thirty years of age, and who does not read and write the English language.

SEC. 40. That a commission, to consist of three members, at least one of whom shall be a native citizen of Porto Rico, shall be appointed by the President, by and with the advice and consent of the Senate, to compile and revise the laws of Porto Rico; also the various codes of procedure and systems of municipal government now in force, and to frame and report such legislation as may be necessary to make a simple, harmonious, and economical government, establish justice and secure its prompt and efficient administration, inaugurate a general system of education and public instruction, provide buildings and funds therefor, equalize and simplify taxation and all the methods of raising revenue, and make all other provisions that may be necessary to secure and extend the benefits of a republican form of government to all the inhabitants of Porto Rico;

and all the expenses of stich commissioners, including all necessary clerks and other assistants that they may employ, and a salary to each member of the commission at the rate of five thousand dollars per annum, shall be allowed and paid out of the treasury of Porto Rico as a part of the expenses of the government of Porto Rico. And said commission shall make full and final report, in both the English and Spanish languages, of all its revisions, compilations, and recommendations, with explanatory notes as to the changes and the reasons therefor, to the Congress on or before one year after the passage of this Act.

SEC. 41. That this Act shall take effect and be in force from and after the first day of May, nineteen hundred.

Approved, April 12, 1900.

CHAP. 145.—An Act To provide a civil government for Porto Rico, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of this Act shall apply to the island of Porto Rico and to the adjacent islands belonging to the United States, and waters of those islands; and the name Porto Rico as used in this Act shall be held to include not only the island of that name but all the adjacent islands as aforesaid.

BILL OF RIGHTS.

SEC. 2. That no law shall be enacted in Porto Rico which shall deprive any person of life, liberty, or property without due process of law, or deny to any person therein the equal protection of the laws.

That in all criminal prosecutions the accused shall enjoy the right to have the assistance of counsel for his defense, to be informed of the nature and cause of the accusation, to have a copy thereof, to have a speedy and public trial, to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favor.

That no person shall be held to answer for a criminal offense without due process of law; and no person for the same offense shall be twice put in jeopardy of punishment, nor shall be compelled in any criminal case to be a witness against himself.

That all persons shall before conviction be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption great.

That no law impairing the obligation of contracts shall be enacted.

That no person shall be imprisoned for debt.

That the privilege of the writ of habeas corpus shall not be suspended, unless when in case of rebellion, insurrection, or invasion the public safety may require it, in either of which events the same may be suspended by the President, or by the governor, whenever during such period the necessity for such suspension shall exist.

That no ex post facto law or bill of attainder shall be enacted.

Private property shall not be taken or damaged for public use except upon payment of just compensation ascertained in the manner provided by law.

Nothing contained in this Act shall be construed to limit the power of the legislature to enact laws for the protection of the lives, health, or safety of employees.

That no law granting a title of nobility shall be enacted, and no person holding any office of profit or trust under the government of Porto Rico shall, without the consent of the Congress of the United States, accept any present, emolument, office, or title of any kind whatever from any king, queen, prince, or foreign State, or any officer thereof.

That excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

That the right to be secure against unreasonable searches and seizures shall not be violated.

That no warrant for arrest or search shall issue but upon probable cause, supported by bath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

That slavery shall not exist in Porto Rico,

That involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall not exist in Porto Rico.

That no law shall be passed abridging the freedom of speech or of the press, or the right of the people peaceably to assemble and petition the Government for redress of grievances.

That no law shall be made respecting an establishment of religion or prohibiting the free exercise thereof, and that the free exercise and enjoyment of religious profession and worship without discrimination or preference shall forever be allowed, and that no political or religious test other than an oath to support the Constitution of the United States and the laws of Porto Rico shall be required as a qualification to any office or public trust under the government of Porto Rico.

That no public money or property shall ever be appropriated, applied, donated, used, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, sectarian institution or association, or system of religion, or for the use, benefit, or support of any priest, preacher, minister, or other religious teacher or dignitary as such, or for charitable, industrial, educational, or benevolent purposes to any person, corporation, or community not under the absolute control of Porto Rico.

Contracting of polygamous or plural marriages hereafter is prohibited.

That one year after the approval of this Act and thereafter it shall be unlawful to import, manufacture, sell, or give away, or to expose for sale or gift any intoxicating drink or drug: *Provided*, That the legislature may authorize and regulate importation, manufacture, and sale of said liquors and drugs for medicinal, sacramental, industrial, and scientific uses only. The penalty for violations of this provision with reference to intoxicants shall be a fine of not less than $25 for the first offense, and for second and subsequent offenses a fine of not less than $50 and imprisonment for not less than one month or more than one year: *And provided further*, That at any general election within five years after the approval of this Act this provision may, upon petition of not less than ten per centum of the qualified electors of Porto Rico, be submitted to a vote of the qualified electors of Porto Rico, and if a majority of all the qualified electors of Porto Rico voting upon such question shall vote to repeal this provision, it shall thereafter not be in force and effect; otherwise it shall be in full force and effect.

That no money shall be paid out of the treasury except in pursuance of an appropriation by law, and on warrant drawn by the proper officer in pursuance thereof.

That the rule of taxation in Porto Rico shall be uniform.

That all money derived from any tax levied or assessed for a special purpose shall be treated as a special fund in the Treasury and paid out for such

purpose only except upon the approval of the President of the United States.

That eight hours shall constitute a day's work in all cases of employment of laborers and mechanics by and on behalf of the government of the island on public works, except in cases of emergency.

That the employment of children under the age of fourteen years in any occupation injurious to health or morals or hazardous to life or limb is hereby prohibited.

SEC. 3. That no export duties shall be levied or collected on exports from Porto Rico, but taxes and assessments on property, internal revenue, and license fees, and royalties for franchises, privileges, and concessions may be imposed for the purposes of the insular and municipal governments, respectively, as may be provided and defined by the Legislature of Porto Rico; and when necessary to anticipate taxes and revenues, bonds and other obligations may be issued by Porto Rico or any municipal government therein as may be provided by law, and to protect the public credit: *Provided, however,* That no public indebtedness of Porto Rico or of any subdivision or municipality thereof shall be authorized or allowed in excess of seven per centum of the aggregate tax valuation of its property, and all bonds issued by the government of Porto Rico, or by its authority, shall be exempt from taxation by the Government of the United States, or by the government of Porto Rico or of any political or municipal subdivision thereof, or by any State, or by any county, municipality, or other municipal subdivision of any State or Territory of the United States, or by the District of Columbia. In computing the indebtedness of the people of Porto

Rico, bonds issued by the people of Porto Rico secured by an equivalent amount of bonds of municipal corporations or school boards of Porto Rico shall not be counted.

SEC. 4. That the capital of Porto Rico shall be at the city of San Juan, and the seat of government shall be maintained there.

SEC. 5. That all citizens of Porto Rico, as defined by section seven of the Act of April twelfth, nineteen hundred, "temporarily to provide revenues and a civil government for Porto Rico, and for other purposes," and all natives of Porto Rico who were temporarily absent from that island on April eleventh, eighteen hundred and ninety-nine, and have since returned and are permanently residing in that island, and are not citizens of any foreign country, are hereby declared, and shall be deemed and held to be, citizens of the United States: *Provided,* That any person hereinbefore described may retain his present political status by making a declaration, under oath, of his decision to do so within six months, of the taking effect of this Act before the district court in the district in which he resides, the declaration to be in form as follows:

"I,_____, being duly sworn, hereby declare my intention not to become a citizen of the United States as provided in the Act of Congress conferring United States citizenship upon citizens of Porto Rico and certain natives permanently residing in said island."

In the case of any such person who may be absent from the island during said six months the term of this proviso may be availed of by transmitting a declaration, under oath, in the form herein provided within six months of the taking effect of this Act to

the executive secretary of Porto Rico: *And provided further,* That any person who is born in Porto Rico of an alien parent and is permanently residing in that island may, if of full age, within six months of the taking effect of this Act, or if a minor, upon reaching his majority or within one year thereafter, make a sworn declaration of allegiance to the United States before the United States District Court for Porto Rico, setting forth therein all the facts connected with his or her birth and residence in Porto Rico and accompanying due proof thereof, and from and after the making of such declaration shall be considered to be a citizen of the United States.

SEC. 6. That all expenses that may be incurred on account of the government of Porto Rico for salaries of officials and the conduct of their offices and departments, and all expenses and obligations contracted for the internal improvement or development of the island, not, however, including defenses, barracks, harbors, lighthouses, buoys, and other works undertaken by the United States, shall, except as otherwise specifically provided by the Congress, be paid by the treasurer of Porto Rico out of the revenue in his custody.

SEC. 7 That all property which may have been acquired in Porto Rico by the United States under the cession of Spain in the treaty of peace entered into on the tenth day of December, eighteen hundred and ninety-eight, in any public bridges, road houses, water powers, highways, unnavigable streams and the beds thereof, subterranean waters, mines or minerals under the surface of private lands, all property which at the time of the cession belonged, under the laws of Spain then in force, to the various

harbor works boards of Porto Rico, the harbor shores, docks, slips, reclaimed lands, and all public lands and buildings not heretofore reserved by the united States for public purposes, is hereby placed under the control of the government of Porto Rico, to be administered for the benefit of the people of Porto Rico; and the Legislature of Porto Rico shall have authority, subject to the limitations imposed upon all its acts, to legislate with respect to all such matters as it may deem advisable: *Provided,* That the President may from time to time, in his discretion, convey to the people of Porto Rico such lands, buildings, or interests in lands or other property now owned by the United States and within the territorial limits of Porto Rico as in his opinion are no longer needed for purposes of the United States. And he may from time to time accept by legislative grant from Porto Rico any lands, buildings, or other interests or property which may be needed for public purposes by the United States.

SEC. 8. That the harbor areas and navigable streams and bodies of water and submerged lands underlying the same in and around the island of Porto Rico and the adjacent islands and waters, now owned by the United States and not reserved by the United States for public purposes, be, and the same are hereby, placed under the control of the government of Porto Rico, to be administered in the same manner and subject to the same limitations as the property enumerated in the preceding section: *Provided,* That all laws of the United States for the protection and improvement of the navigable waters of the United States and the preservation of the interests of navigation and commerce, except so far as the same may be locally inapplicable, shall apply

to said island and waters and to its adjacent islands and waters: *Provided further,* That nothing in this Act contained shall be construed so as to affect or impair in any manner the terms or conditions of any authorizations, permits, or other powers heretofore lawfully granted or exercised in or in respect of said waters and submerged lands in and surrounding said island and its adjacent islands by the Secretary of War or other authorized officer or agent of the United States: *And provided further,* That the Act of Congress approved June eleventh, nineteen hundred and six, entitled "An Act to empower the Secretary of War, under certain restrictions, to authorize the construction, extension, and maintenance of wharves, piers, and other structures on lands underlying harbor areas in navigable streams and bodies of water in or surrounding Porto Rico and the islands adjacent thereto," and all other laws and parts of laws in conflict with this section be, and the same are hereby, repealed.

SEC. 9. That the statutory laws of the United States not locally inapplicable, except as hereinbefore or hereinafter otherwise provided, shall have the same force and effect in Porto Rico as in the United States, except the internal-revenue laws: *Provided, however,* That hereafter all taxes collected under the internal-revenue laws of the United States on articles produced in Porto Rico and transported to the United States, or consumed in the island shall be covered into the treasury of Porto Rico.

SEC. 10. That all judicial process shall run in the name of "United States of America, ss, the President of the United States," and all penal or criminal prosecutions in the local courts shall be conducted in

the name and by the authority of "The People of Porto Rico"; and all officials shall be citizens of the United States, and, before entering upon the duties of their respective offices, shall take an oath to support the Constitution of the United States and the laws of Porto Rico.

SEC. 11. That all reports required by law to be made by the governor or heads of departments to any official of the United States shall hereafter be made to an executive department of the Government of the United States to be designated by the President, and the President is hereby authorized to place all matters pertaining to the government of Porto Rico in the jurisdiction of such department.

EXECUTIVE DEPARTMENT.

SEC. 12. That the supreme executive power shall be vested in an executive officer, whose official title shall be "The Governor of Porto Rico." He shall be appointed by the President, by and with the advice and consent of the Senate, and hold his office at the pleasure of the President and until his successor is chosen and qualified. The governor shall reside in Porto Rico during his official incumbency and maintain his office at the seat of government. He shall have general supervision and control of all the departments and bureaus of the government in Porto Rico, so far as is not inconsistent with the provisions of this Act, and shall be commander in chief of the militia. He may grant pardons and reprieves and remit fines and forfeitures for offenses against the laws of Porto Rico, and respites for all offenses against the laws of the United States until the decision of the President can be ascertained, and may veto any legislation enacted as hereinafter

provided. He shall commission all officers that he may be authorized to appoint. He shall be responsible for the faithful execution of the laws of Porto Rico and of the United States applicable in Porto Rico, and whenever it becomes necessary he may call upon the commanders of the military and naval forces of the United States in the island, or summon the posse comitatus, or call out the militia to prevent or suppress lawless violence, invasion, insurrection, or rebellion, and he may, in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it, suspend the privilege of the writ of habeas corpus, or place the island, or any part thereof, under martial law until communication can be had with the President and the President's decision therein made known. He shall annually, and at such other times as he may be required, make official report of the transactions of the government of Porto Rico to the executive department of the Government of the United States to be designated by the President as herein provided, and his said annual report shall be transmitted to Congress, and he shall perform such additional duties and functions as may in pursuance of law be delegated to him by the President.

SEC. 13. That the following executive departments are hereby created: A department of justice, the head of which shall be designated as the attorney, general; a department of finance, the head of which shall be designated as the treasurer; a department of interior, the head of which shall be designated as the commissioner of the interior; a department of education, the head of which shall be designated as the commissioner of education; a department of agriculture and labor, the head of which shall be

designated as the commissioner of agriculture and labor; and a department of health, the head of which shall be designated as the commissioner of health. The attorney general and commissioner of education shall be appointed by the President, by and with the advice and consent of the Senate of the United States, to hold office for four years and until their successors are appointed and qualified, unless sooner removed by the President. The heads of the four remaining departments shall be appointed by the governor, by and with the advice and consent of the Senate of Porto Rico. The heads of departments appointed by the governor shall hold office for the term of four years and until their successors are appointed and qualified, unless sooner removed by the governor.

Heads of departments shall reside in Porto Rico during their official incumbency, and those appointed by the governor shall have resided in Porto Rico for at least one year prior to their appointment.

The heads of departments shall collectively form a council to the governor, known as the executive council. They shall perform under the general supervision of the governor the duties hereinafter prescribed, or which may hereafter be prescribed by law and such other duties, not inconsistent with law, as the governor, with the approval of the President, may assign to them; and they shall make annual and such other reports to the governor as he may require, which shall be transmitted to the executive department of the Government of the United States to be designated by the President as herein provided . *Provided,* That the duties herein imposed upon the

heads of departments shall not carry with them any additional compensation.

SEC. 14. That the attorney general shall have charge of the administration of justice in Porto Rico; he shall be the legal adviser of the governor and the heads of departments and shall be responsible for the proper representation of the people of Porto Rico or its duly constituted officers in all actions and proceedings, civil or criminal, in the Supreme Court of Porto Rico in which the people of Porto Rico shall be interested or a party, and he may, if directed by the governor or if in his judgment the public interest requires it, represent the people of Porto Rico or its duly constituted officers in any other court or before any other officer or board in any action or proceeding, civil or criminal, in which the people of Porto Rico may be a party or be interested. He shall also perform such other duties not inconsistent herewith as may be prescribed by law.

SEC. 15. That the treasurer shall give bond, approved as to form by the attorney general of Porto Rico, in such sum as the legislature may require, not less, however, than the sum of $125,000, with surety or sureties approved by the governor, and he shall collect and be the custodian of public funds, and shall disburse the same in accordance with law, on warrants signed by the auditor and countersigned by the governor, and perform such other duties as may be provided by law. He may designate banking institutions in Porto Rico and the United States as depositaries of the government of Porto Rico, subject to such conditions as may be prescribed by the governor, after they have filed with him satisfactory evidence of their sound financial condition and have

deposited bonds of the United States or of the government of Porto Rico or other security satisfactory to the governor in such amounts as may be indicated by him; and no banking institution shall be designated a depositary of the government or Porto Rico until the foregoing conditions have been complied with. Interest on deposits shall be required and paid into the treasury.

SEC. 16. That the commissioner of the interior shall superintend all works of a public nature, have charge of all public buildings, grounds, and lands, except those belonging to the United States, and shall execute such requirements as may be imposed by law with respect thereto, and perform such other duties as may be prescribed by law.

SEC. 17. That the commissioner of education shall superintend public instruction throughout Porto Rico; all proposed disbursements on account thereof must be approved by him, and all courses of study shall be prepared by him, subject to disapproval by the governor if he desires to act. He shall prepare rules governing the selection of teachers, and appointments of teachers by local school boards shall be subject to his approval, and he shall perform such other duties, not inconsistent with this Act, as may be prescribed by law.

SEC. 18. That the commissioner of agriculture and labor shall have general charge of such bureaus and branches of government as have been or shall be legally constituted for the study, advancement, and benefit of agricultural and other industries, the chief purpose of this department being to foster, promote, and develop the agricultural interests and the welfare of the wage earners of Porto Rico, to improve

their working conditions, and to advance their opportunities for profitable employment, and shall perform such other duties as may be prescribed by law.

SEC. 19. That the commissioner of health shall have general charge of all matters relating to public health, sanitation, and charities, except such as relate to the conduct of maritime quarantine, and shall perform such other duties as may be prescribed by law.

SEC. 20. That there shall be appointed by the President an auditor, at an annual salary of 85,000, for a term of four years and until his successor is appointed and qualified, who shall examine, audit, and settle all accounts pertaining to the revenues and receipts, from whatever source, of the government of Porto Rico and of the municipal governments of Porto Rico, including public trust funds and funds derived from bond issues; and audit, in accordance with law and administrative regulations, all expenditures of funds or property pertaining to or held in trust by the government of Porto Rico or the municipalities or dependencies thereof. He shall perform a like duty with respect to all government branches.

He shall keep the general accounts of the government and preserve the vouchers pertaining thereto.

It shall be the duty of the auditor to bring to the attention of the proper administrative officer expenditures of funds or property which, in his opinion, are irregular, unnecessary, excessive, or extravagant.

In case of vacancy or of the absence from duty, from any cause, of the auditor, the Governor of Porto Rico may designate an assistant, who shall have charge of the office.

The jurisdiction of the auditor over accounts, whether of funds or property, and all vouchers and records pertaining thereto, shall be exclusive. With the approval of the governor, he shall from time to time make and promulgate general or special rules and regulations not inconsistent with law covering the methods of accounting for public funds and property, and funds and property held in trust by the government or any of its branches: *Provided*, That any officer accountable for public funds or property may require such additional reports or returns from his subordinates or others as he may deem necessary for his own information and protection.

The decisions of the auditor shall be final, except that appeal therefrom may be taken by the party aggrieved or the head of the department concerned within one year, in the manner hereinafter prescribed. The auditor shall, except as hereinafter provided, have like authority as that conferred by the law upon the several auditors of the United States and the Comptroller of the United States Treasury, and is authorized to communicate directly with any person having claims before him for settlement, or with any department, officer, or person having official relations with his office.

As soon after the close of each fiscal year as the accounts of said year may be examined and adjusted, the auditors shall submit to the governor an annual report of the fiscal concerns of the government, showing the receipts and disbursements of the

various departments and bureaus of the government and of the various municipalities, and make such other reports as may be required of him by the governor or the head of the executive department of the Government of the United States, to be designated by the President as herein provided.

In the execution of his duties the auditor is authorized to summon witnesses, administer oaths, and to take evidence, and, in the pursuance of these provisions, may issue subpoenas and enforce the attendance of witnesses.

The office of the auditor shall be under the general supervision of the governor and shall consist of the auditor and such necessary assistants as may be prescribed by law.

SEC. 21. That any person aggrieved by the action or decision of the auditor in the settlement of his account or claim may, within one year, take an appeal in writing to the governor, which appeal shall specifically set forth the particular action of the auditor to which exception is taken, with the reason and authorities relied on for reversing such decision. The decision of the governor in such case shall be final, subject to such right of action as may be otherwise provided by law.

SEC. 22. That there shall be appointed by the governor, by and with the advice and consent of the Senate of Porto Rico, an executive secretary at an annual salary of $4,000, who shall record and preserve the minutes and proceedings of the public service commission hereinafter provided for and the laws enacted by the legislature and all acts and proceedings of the governor, and promulgate all proclamations and orders of the governor and all

laws enacted by the legislature, and until otherwise provided by the legislature of Porto Rico perform all the duties of secretary of Porto Rico as now provided by law, except as otherwise specified in this Act, and perform such other duties as may be assigned to him by the Governor of Porto Rico. In the event of a vacancy in the office, or the absence, illness, or temporary disqualification of such officer, the governor shall designate some officer or employee of the government to discharge the functions of said office during such vacancy, absence, illness, or temporary disqualification.

SEC. 23. That the Governor of Porto Rico within sixty days after the end of each session of the legislature, shall transmit to the executive department of the Government of the United States, to be designated as herein provided for, which shall in turn transmit the same to the Congress of the United States, copies of all laws enacted during the session.

SEC. 24. That the President may from time to time designate the head of an executive department of Porto Rico to act as governor in the case of a vacancy, the temporary removal, resignation, or disability of the governor, or his temporary absence, and the head of the department thus designated shall exercise all the powers and perform all the duties of the governor during such vacancy, disability, or absence.

LEGISLATIVE DEPARTMENT.

SEC. 25. That all local legislative powers in Porto Rico, except as herein otherwise provided, shall be vested in a legislature which shall consist of two houses, one the senate and the other the house of

representatives, and the two houses shall be designated "the Legislature of Porto Rico."

SEC, 26. That the Senate of Porto Rico shall consist of nineteen members elected for terms of four years by the qualified electors of Porto Rico. Each of the seven senatorial districts defined as hereinafter provided shall have the right to elect two senators, and in addition thereto there shall be elected five senators at large. No person shall be a member of the Senate of Porto Rico who is not over thirty years of age, and who is not able to read and write either the Spanish or English language, and who has not been a resident of Porto Rico for at least two consecutive years, and, except in the case of senators at large, an actual resident of the senatorial district from which chosen for a period of at least one year prior to his election. Except as herein otherwise provided, the Senate of Porto Rico shall exercise all of the purely legislative powers and functions heretofore exercised by the Executive Council, including confirmation of appointments; but appointments made while the senate is not in session shall be effective either until disapproved or until the next adjournment of the senate for the session. In electing the five senators at large each elector shall be permitted to vote for but one candidate, and the five candidates receiving the largest number of votes shall be declared elected.

SEC. 27. That the House of Representatives of Porto Rico shall consist of thirty-nine members elected quadrennially by the qualified electors of Porto Rico, as hereinafter provided. Each of the representative districts hereinafter provided for shall have the right to elect one representative, and in

addition thereto there shall be elected four representatives at large. No person shall be a member of the house of representatives who is not over twenty-five years of age, and who is not able to read and write either the Spanish or English language, except in the case of representative at large, who has not been a bona fide resident of the district from which elected for at least one year prior to his election. In electing the four representatives at large, each elector shall be permitted to vote for but one candidate and the four candidates receiving the largest number of votes shall be elected.

SEC. 28. That for the purpose of elections hereafter to the legislature the "island of Porto Rico shall be divided into thirty-five representative districts, composed of contiguous and compact territory and established, so far as practicable, upon the basis of equal population. The division into and the demarcation of such districts shall be made by the Executive Council of Porto Rico. Division of districts shall be made as nearly as practicable to conform to the topographical nature of the land, with regard to roads and other means of communication and to natural barriers. Said Executive Council shall also divide the island of Porto Rico into seven senatorial districts, each composed of five contiguous and compact representative districts. They shall make their report within thirty days after the approval of this Act, which report, when approved by the governor, shali be final.

SEC. 29. That the next election in Porto Rico shall be held in the year nineteen hundred and seventeen upon the sixteenth day of July. At such election there shall be chosen senators, representatives, a

Resident Commissioner to the United States, and two public-service commissioners, as herein provided. Thereafter the elections shall be held on the first Tuesday after the first Monday in November, beginning with the year nineteen hundred and twenty, and every four years thereafter, and the terms of office of all municipal officials who have heretofore been elected and whose terms would otherwise expire at the beginning of the year nineteen hundred and nineteen are hereby extended until the officials who may be elected to fill such offices in nineteen hundred and twenty shall have been duly qualified: *Provided, however,* That nothing herein contained shall be construed to limit the right of the Legislature of Porto Rico at any time to revise the boundaries of senatorial and representative districts and of any municipality, or to abolish any municipality and the officers provided therefor.

SEC. 30. That the term of office of senators and representatives chosen by the first general election shall be until January first, nineteen hundred and twenty-one, and the terms of office of senators and representatives chosen at subsequent elections shall be four years from the second of January following their election. In case of vacancy among the members of the senate or in the house of representatives, special elections may be held in the districts wherein such vacancy occurred, under such regulations as may be prescribed by law, but senators or representatives elected in such cases shall hold office only for the unexpired portion of the term wherein the vacancy occurred, and no senator or representative shall, during the time for which he shall have been elected, be appointed to any civil office under the government of Porto Rico, nor be

appointed to any office created by Act of the legislature during the time for which he shall have been elected until two years after his term of office shall have expired.

SEC. 31. That members of the Senate and House of Representatives for Porto Rico shall receive compensation at the rate of $7 per day for the first ninety days of each regular session and $1 per day for each additional day of such session while in session, and mileage for each session at the rate of 10 cents per kilometer for each kilometer actually and necessarily traveled in going from their legislative districts to the capital and therefrom to their place of residence in their districts by the usual routes of travel.

SEC. 32. That the senate and house of representatives, respectively, shall be the sole judges of the elections, returns, and qualifications of their members, and they shall have and exercise all the powers with respect to the conduct of their proceedings that usually pertain to parliamentary legislative bodies. Both houses shall convene at the capital on the second Monday in February following the next election, and organize by the election of a speaker or a presiding officer, a clerk, and a sergeant at arms for each house, and such other officers and assistants as may be required.

SEC. 33. That the first regular session of the Legislature of Porto Rico, provided for by this Act, shall convene on the twenty-eighth day after the first election provided for herein, and regular sessions of the legislature shall be held biennially thereafter, convening on the second Monday in February of the year nineteen hundred and nineteen, and on the

second Monday in February of each second year thereafter. The governor may call special sessions of the legislature or of the senate at any time when in his opinion the public interest may require it, but no special session shall continue longer than ten days, not including Sundays and holidays, and no legislation shall be considered at such session other than that specified in the call, and he shall call the senate in special session at least once each year on the second Monday in February of those years in which a regular session of the legislature is not provided for.

SEC. 34. That the enacting clause of the laws shall be as to acts, "Be it enacted by the Legislature of Porto Rico," and as to joint resolutions, "Be it resolved by the Legislature of Porto Rico." Except as hereinafter provided, bills and joint resolutions may originate in either house. The governor shall submit at the opening of each regular session of the legislature a budget of receipts and expenditures, which shall be the basis of the ensuing biennial appropriation bill. No bill shall become a law until it be passed in each house by a majority yea-and-nay vote of all of the members belonging to such house and entered upon the journal and be approved by the governor within ten days thereafter. If when a hill that has been passed is presented to the governor for his signature he approves the same, he shall sign it; or if not, he shall return it, with his objections, to the house in which it originated, which house shall enter his objections at large on its journal and proceed to reconsider it. If, after such reconsideration, two-thirds of all the members of that house shall agree to pass the same it shall be sent, together with the objections, to the other house, by which it shall

likewise be reconsidered, and if approved by two-thirds of all the members of that house it shall be sent to the governor, who, in case he shall then not approve, shall transmit the same to the President of the United States. The vote of each house shall be by yeas and nays, and the names of the members voting for and against shall be entered on the journal. If the President of the United States approve the same he shall sign it and it shall become a law. If he shall not approve same he shall return it to the governor so stating, and it shall not become a law: *Provided,* That the President of the United States shall approve or disapprove an Act submitted to him under the provisions of this section within ninety days from and after its submission for his approval; and if not approved within such time it shall become a law the same as if it had been specifically approved. If any bill presented to the governor contains several items of appropriation of money, he may object to one or more of such items, or any part or parts, portion or portions thereof, while approving of the other portion of the bill. In such case he shall append to the bill, at the time of signing it, a statement of the items, parts or portions thereof to which he objects, and the appropriation so objected to shall not take effect. If any bill shall not be returned by the governor within ten days (Sundays excepted) after it shall have been presented to him, it shall be a law in like manner as if he had signed it, unless the legislature by adjournment prevents its return, in which case it shall be a law if signed by the governor within thirty days after receipt by him; otherwise it shall not be a law. All laws enacted by the Legislature of Porto Rico shall be reported to the Congress of the United States, as provided in section

twenty-three of this Act, which hereby reserves the power and authority to annul the same. If at the termination of any fiscal year the appropriations necessary for the support of the government for the ensuing fiscal year shall not have been made, the several sums appropriated in the last appropriation bills for the objects and purposes therein specified, so far as the same may be applicable, shall be deemed to be reappropriated item by item; and until the legislature shall act in such behalf the treasurer may, with the advice of the governor, make the payments necessary for the purposes aforesaid.

Each house shall keep a journal of its proceedings, and may, in its discretion, from time to time publish the same, and the yeas and nays on any question shall, on the demand of one-fifth of the members present, be entered on the journal.

The sessions of each house and of the committees of the whole shall be open.

Neither home shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two houses shall be sitting.

No law shall be passed except by bill, and no bill shall be so altered or amended on its passage through either house as to change its original purpose.

No act or the legislature except the general appropriation bills for the expenses of the government shall take effect until ninety days after its passage, unless in case of emergency (which shall be expressed in the preamble or body of the act) the legislature shall by a vote of two-thirds of all the

members elected to each house otherwise direct. No bill, except the general appropriation bill for the expenses of the government only, introduced m either house of the legislature after the first forty days of the session, shall become a law.

No bill shall be considered or become a law unless referred to a committee, returned therefrom, and printed for the use of the members: *Provided,* That either house may by a majority vote discharge a committee from the consideration of a measure and bring it before the body for consideration.

No bill, except general appropriation bills, shall be passed containing more than one subject, which shall be clearly expressed in its title; but if any subject shall be embraced in any act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed.

No law shall be revived, or amended, or the provisions thereof extended or conferred by reference to its title only, but so much thereof as is revived, amended, extended, or conferred shall be reenacted and published at length.

The presiding officer of each house shall, in the presence of the house over which he presides, sign all bills and joint resolutions passed by the legislature, after their titles shall have been publicly read, immediately before signing; and the fact of signing shall be entered on the journal.

The legislature shall prescribe by law the number, duties, and compensation of the officers and employees of each house; and no payment shall be made for services to the legislature from the treasury, or be in any way authorized to any person,

except to an acting officer or employee elected or appointed m pursuance of law.

No bill shall be passed giving any extra compensation to any public officer, servant or employee, agent or contractor, after services shall have been rendered or contract made.

Except as otherwise provided in this Act, no law shall extend the term of any public officer, or increase or diminish his salary or emoluments after his election or appointment, nor permit any officer or employee to draw compensation for more than one office or position.

All bills for raising revenue shall originate in the house of representatives, but the senate may propose or concur with amendments, as in case of other bills.

The general appropriation bill shall embrace nothing but appropriations for the ordinary expenses of the executive, legislative, and judicial departments, interest on the public debt, and for public schools. All other appropriations shall be made by separate bills, each embracing but one subject.

Every order, resolution, or vote to which the concurrence of both houses may be necessary, except on the question of adjournment, or relating solely to the transaction of business of the two houses, shall be presented to the governor, and before it shall take effect be approved by him, or, being disapproved, shall be repassed by two-thirds of both houses, according to the rules and limitations prescribed in case of a bill.

Any person who shall, directly or indirectly, offer, give, or promise any money or thing of value,

testimonial, privilege, or personal advantage to any executive or judicial officer or member of the legislature to influence him in the performance of any of his public or official duties, shall be deemed guilty of bribery, and be punished by a fine not exceeding 15,000, or imprisonment not exceeding five years, or both.

The offense of corrupt solicitation of members of the legislature, or of public officers of Porto Rico, or of any municipal division thereof, and any occupation or practice of solicitation of such members or officers to influence their official action, shall be defined by law, and shall be punished by fine and imprisonment.

In case the available revenues of Porto Rico for any fiscal year, including available surplus in the insülar treasury, are insufficient to meet all the appropriations made by the legislature for such year, such appropriations shall be paid in the following order, unless otherwise directed by the governor:

First class. The ordinary expenses of the legislative, executive, and judicial departments of the State government, and interest on any public debt, shall first be paid in full.

Second class. Appropriations for all institutions, such as the penitentiary, insane asylum, industrial school, and the like, where the inmates are confined involuntarily, shall next be paid in full.

Third class. Appropriations for education and educational and charitable institutions shall next be paid in full.

Fourth class. Appropriations for any other officer or officers, bureaus or boards, shall next be paid in full.

Fifth class. Appropriations for all other purposes shall next be paid.

That in case there are not sufficient revenues for any fiscal year, including available surplus in the insular treasury, to meet in full the appropriations of said year for all of the said classes of appropriations, then said revenues shall be applied to the classes in the order above named, and if, after the payment of the prior classes in full, there are not sufficient revenues for any fiscal year to pay in full the appropriations for that year for the next class, then, in that event, whatever there may be to apply on account of appropriations for said class shall be distributed among said appropriations pro rata according as the amount of each appropriation of that class shall bear to the total amount of all of said appropriations for that class for such fiscal year.

No appropriation shall be made, nor any expenditure authorized; by the legislature, whereby the expenditure of the Government of Porto Rico during any fiscal year shall exceed the total revenue then provided for by law and applicable for such appropriation or expenditure, including any available surplus in the treasury, unless the legislature making such appropriation shall provide for levying a sufficient tax to pay such appropriation or expenditure within such fiscal year.

SEC. 35. That at the first election held pursuant to this Act the qualified electors shall be those having the qualifications of voters under the present law. Thereafter voters shall be citizens of the United

States twenty-one years of age or over and have such additional qualifications as may be prescribed by the legislature of Porto Rico: *Provided*, That no property qualification shall ever be imposed upon or required of any voter.

SEC. 36. That the qualified electors of Porto Rico shall at the next general election choose a Resident Commissioner to the United States, whose term of office shall begin on the date of the issuance of his certificate of election and shall continue until the fourth of March, nineteen hundred and twenty-one. At each subsequent election, beginning with the year nineteen hundred and twenty, the qualified electors of Porto Rico shall choose a Resident Commissioner to the United States, whose term of office shall be four years from the fourth of March following such general election, and who shall be entitled to receive official recognition as such Commissioner by all of the departments of the Government of the United States, upon presentation, through the Department of State, of a certificate of election of the Governor of Porto Rico. The Resident Commissioner shall receive a salary, payable monthly by the United States, of $7,500 per annum. Such Commissioner shall be allowed the same sum for stationery and for the pay of necessary clerk hire as is now allowed to Members of the House of Representatives of the United States; and he shall be allowed the sum of $500 as mileage for each session of the House of Representatives and the franking privilege granted Members of Congress. No person shall be eligible to election as Resident Commissioner who is not a bona fide citizen of the United States and who is not more than twenty-five years of age, and who does not read and write the English language. In case of a vacancy in the office

of Resident Commissioner by death, resignation, or otherwise, the governor, by and with the advice and consent of the senate, shall appoint a Resident Commissioner to fill the vacancy, who shall serve until the next general election and until his successor is elected and qualified.

SEC. 37. That the legislative authority herein provided shall extend to all matters of a legislative character not locally inapplicable, including power to create, consolidate, and reorganize the municipalities so far as may be necessary, and to provide and repeal laws and ordinances therefor; also the power to alter, amend, modify, or repeal any or all laws and ordinances of every character now in force in Porto Rico or municipality or district thereof in so far as such alteration, amendment, modification, or repeal may be consistent with the provisions of this Act.

No executive department not provided for in this Act shall be created by the legislature, but the legislature may consolidate departments, or abolish any department, with the consent of the President of the United States.

SEC. 38. That all grants of franchises, rights, and privileges of a public or quasi public nature shall be made by a public-service commission, consisting of the heads of executive departments, the auditor, and two commissioners to be elected by the qualified voters at the first general election to be held under this Act, and at each subsequent general election thereafter. The terms of said elective commissioners elected at the first general election shall commence on the twenty-eighth day following the said general election, and the terms of the said elective commissioners elected at each subsequent general

election shall commence on the second day of January following their election; they shall serve for four years and until their successors are elected and qualified. Their compensation shall be $8 for each day's attendance on the sessions of the commission, but in no case shall they receive more than $400 each during any one year. The said commission is also empowered and directed to discharge all the executive functions relating to public-service corporations heretofore conferred by law upon the executive council. Franchises, rights, and privileges granted by the said commission shall not be effective until approved by the governor, and shall be reported to Congress, which hereby reserves the power to annul or modify the same.

The interstate-commerce Act and the several amendments made or to be made thereto, the safety-appliance Acts and the several amendments made or to be made thereto, and the Act of Congress entitled "An Act to amend an Act entitled 'An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, and all Acts amendatory thereof, by providing for a valuation of the several classes of property of carriers subject thereto and securing information concerning their stocks, bonds, and other securities," approved March first, nineteen hundred and thirteen, shall not apply to Porto Rico.

The Legislative Assembly of Porto Rico is hereby authorized to enact laws relating to the regulation of the rates, tariffs, and service of public carriers by rail in Porto Rico, and the Public-Service Commission hereby created shall have power to enforce such laws under appropriate regulation.

SEC. 39. That all grants of franchises and privileges under the section last preceding shall provide that the same shall be subject to amendment, alteration, or repeal, and shall forbid the issue of stocks or bonds except in exchange for actual cash or property at a fair valuation to be determined by the public-service commission equal in amount to the par value of the stocks or bonds issued, and shall forbid the declaring of stock or bond dividends, and in the case of public-service corporations shall provide for the effective regulation of charges thereof and for the purchase or taking of their property by the authorities at a fair and reasonable valuation.

That nothing in this Act contained shall be so construed as to abrogate or in any manner impair or affect the provision contained in section three of the joint resolution approved May first, nineteen hundred, with respect to the buying, seining, or holding of real estate. That the Governor of Porto Rico shall cause to have made and submitted to Congress at the session beginning the first Monday in December, nineteen hundred and seventeen, a report of all the real estate used for the purposes of agriculture and held either directly or indirectly by corporations, partnerships, or individuals in holdings in excess of five hundred acres.

JUDICIAL DEPARTMENT.

SEC. 40. That the judicial power shall be vested in the courts and tribunals of Porto Rico now established and in operation under and by virtue of existing laws. The jurisdiction of said courts and the form of procedure in them, and the various officers and attaches thereof, shall also continue to be as now

provided until otherwise provided by law: *Provided, however,* That the chief justice and associate justices of the supreme court shall be appointed by the President, by and with the advice and consent of the Senate of the United States, and the Legislature of Porto Rico shall have authority, from time to time as it may see fit, not inconsistent with this Act, to organize, modify, or rearrange the courts and their jurisdiction and procedure, except the District Court of the United States for Porto Rico.

SEC. 41. That Porto Rico shall constitute a judicial district to be called "the district of Porto Rico." The President, by and with the advice and consent of the Senate, shall appoint one district judge, who shall serve for a term of four years and until his successor is appointed and qualified and whose salary shall be $5,000 per annum. There shall be appointed in like manner a district attorney, whose salary shall be $4,000 per annum, and a marshal for said district, whose salary shall be $3,500 per annum, each for a term of four years unless sooner removed by the President. The district court for said district shall be called "the District Court of the United States for Porto Rico," and shall have power to appoint all necessary officials and assistants, including the clerk, interpreter, and such commissioners as may be necessary, who shall be entitled to the same fees and have like powers and duties as are exercised and performed by United States commissioners. Such district court shall have jurisdiction of all cases cognizable in the district courts of the United States, and shall proceed in the same manner. In addition said district court shall have jurisdiction for the naturalization of aliens and Porto Ricans, and for this purpose residence in Porto Rico shall be counted

in the same manner as residence elsewhere in the United States. Said district court shall have jurisdiction of all controversies where all of the parties on either side of the controversy are citizens or subjects of a foreign State or States, or citizens of a State, Territory, or District of the United States not domiciled in Porto Rico, wherein the matter in dispute exceeds, exclusive of interest or cost, the sum or value of $3,000, and of all controversies in which there is a separable controversy involving such jurisdictional amount and in which all of the parties on either side of such separable controversy are citizens or subjects of the character aforesaid: *Provided,* That nothing in this Act shall be deemed to impair the jurisdiction of the District Court of the United States for Porto Rico to hear and determine all controversies pending in said court at the date of the approval of this Act. Upon the taking effect of this Act the salaries of the judge and officials of the District Court of the United States for Porto Rico, together with the court expenses, shall be paid from the United States revenues in the same manner as in other United States district courts. In case of vacancy or of the death, absence, or other legal disability on the part of the judge of the said District Court of the United States for Porto Rico, the President of the United States is authorized to designate one of the judges of the Supreme Court of Porto Rico to discharge the duties of judge of said court until such absence or disability shall be removed, and thereupon such judge so designated for said service shall be fully authorized and empowered to perform the duties of said office during such absence or disability of such regular judge, and to

sign all necessary papers and records as the acting judge of said court, without extra compensation.

SEC. 42. That the laws of the United States relating to appeals, writs of error and certiorari, removal of causes, and other matters or proceedings as between the courts of the United States and the courts of the several States shall govern in such matters and proceedings as between the district court of the United States and the courts of Porto Rico. Regular terms of said United States district court shall be held at San Juan, commencing on the first Monday in May and November of each year, and also at Ponce on the second Monday in February of each year, and special terms may be held at Mayaguez at such stated times as said judge" pleadings English and proceedings in said court language. The said district court shall be attached to and included in the first circuit of the United States, with the right of appeal and review by said circuit court of appeals in all cases where the same would lie from any district court to a circuit court of appeals of the United States, and with the right of appeal and review directly by the Supreme Court of the United States in all cases where a direct appeal would be from such district courts.

SEC. 43. That writs of error and appeals from the final judgments and decrees of the Supreme Court of Porto Rico may be taken and prosecuted to the Circuit Court of Appeals for the First Circuit and to the Supreme Court of the United States, as now provided by law.

SEC. 44. That the qualifications of jurors as fixed by the local laws of Porto Rico shall not apply to jurors selected to serve in the District Court of the

United States for Porto Rico; but the qualifications required of jurors in said court shall be that each shall be of the age of not less than twenty-one years and not over sixty-five years, a resident of Porto Rico for not less than one year, and have a sufficient knowledge of the English language to enable him to serve as a juror; they shall also be citizens of the United States. Juries for the said court shall be selected, drawn and subject to exemption in accordance with the laws of Congress regulating the same in the United States courts in so far as locally applicable.

SEC. 45. That all such fees, fines, costs, and forfeitures as would be deposited to the credit of the United States if collected and paid into a district court of the United States shall become revenues of the United States when collected and paid into the District Court of the United States for Porto Rico: *Provided,* That $500 a year from such fees, fines, costs, and forfeitures shall be retained by the clerk and expended for law library purposes under the direction of the judge.

SEC. 46. That the Attorney General of the United States shall from time to time determine the salaries of all officials and assistants appointed by the United States district court, including the clerk, his deputies, interpreter, stenographer, and other officials and employees, the same to be paid by the United States as other salaries and expenses of like character in United States courts.

SEC. 47. That jurors and witnesses in the District Court of the United States for Porto Rico shall be entitled to and receive 15 cents for each mile necessarily traveled over any stage line or by private

conveyance and 10 cents for each mile over any railway in going to and returning from said courts. But no constructive or double mileage fees shall be allowed by reason of any person being summoned both as witness and juror or as witness in two or more cases pending in the same court and triable at the same term thereof. Such jurors shall be paid $3 per day and such witnesses $1.50 per day while in attendance upon the court.

SEC. 48. That the supreme and district courts of Porto Rico and the respective judges thereof may grant writs of habeas corpus in all cases in which the same are grantable by the judges of the district courts of the United States, and the district courts may grant writs of mandamus in all proper cases.

SEC. 49. That hereafter all judges, marshals, and secretaries of courts now established or that may hereafter be established in Porto Rico, and whose appointment by the President is not provided for by law, shall be appointed by the governor, by and with the advice and consent of the Senate of Porto Rico

MISCELLANEOUS PROVISIONS.

SEC. 50. That, except as in this Act otherwise provided, the salaries of all the officials of Porto Rico not appointed by the President, including deputies, assistants, and other help, shall be such and be so paid out of the revenues of Porto Rico as shall from time to time be determined by the Legislature of Porto Rico and approved by the governor; and if the legislature shall fail to make an appropriation for such salaries, the salaries theretofore fixed shall be paid without the necessity of further appropriations therefor. The salaries of all officers and all expenses of the offices of the various officials of Porto Rico

appointed as herein provided by the President shall also be paid out of the revenues of Porto Rico on warrant of the auditor, countersigned by the governor. The annual salaries of the following-named officials appointed by the President and so to be paid shall be: The governor, $10,000; in addition thereto be shall be entitled to the occupancy of the buildings heretofore used by the chief executive of Porto Rico, with the furniture and effects therein, free of rental; heads of executive departments, $5,000; chief justice of the supreme court, $6,500; associate justices of the supreme court, $5,500 each.

Where any officer whose salary is fixed by this act is required to give a bond, the premium thereof shall be paid from the insular treasury.

SEC. 51. That the provisions of the foregoing section shall not apply to municipal officials; their salaries and the compensation of their deputies, assistants, and other help, as well as all other expenses incurred by the municipalities, shall be paid out of the municipal revenues, in such manner as the legislature shall provide.

SEC. 52. That wherever in this Act offices of the insular government of Porto Rico are provided for under the same names as in the heretofore existing Acts of Congress affecting Porto Rico, the present incumbents of those offices shall continue in office in accordance with the terms and at the salaries prescribed by this Act, excepting the heads of those departments who are to be appointed by the governor and who shall continue in office only until their successors are appointed and have qualified. The offices of secretary of Porto Rico and director of labor, charities, and correction are hereby abolished.

Authority is given to the respective appointing authorities to appoint and commission persons to fill the new offices created by this Act.

SEC. 53. That any bureau or office belonging to any of the regular departments of the government, or hereafter created, or not assigned, may be transferred or assigned to any department by the governor with the approval of the Senate of Porto Pico.

SEC. 54. That deeds and other instruments affecting land situate in the District of Columbia, or any other territory or possession of the United States, may be acknowledged in Porto Rico before any notary public appointed therein by proper authority, or any officer therein who has ex officio the powers of a notary public; *Provided,* That the certificate by such notary .shall be accompanied by the certificate of the executive secretary of Porto Rico to the effect that the notary taking such acknowledgment is in fact such notarial officer.

SEC. 55. That nothing in this Act shall be deemed to impair or interrupt the jurisdiction of existing courts over matters pending therein upon the approval of this Act, which jurisdiction is in all respects hereby continued, the purpose of this Act being to preserve the integrity of all of said courts and their jurisdiction until otherwise provided by law, except as in this Act otherwise specifically provided.

SEC. 56. That this Act shall take effect upon approval, but until its provisions shall severally become operative, as hereinbefore provided, the corresponding legislative and executive functions of the government in Porto Rico shall continue to be

exercised and in full force and operation as now provided by law; and the Executive Council shall, until the assembly and organization of the Legislature of Porto Rico as herein provided, consist of the attorney general, the treasurer, the commissioner of the interior, the commissioner of education, the commissioner of health, and the commissioner of agriculture and labor, and the five additional members as now provided by law. And any functions assigned to the Senate of Porto Rico by the provisions of this Act shall, until this said senate has assembled and organized as herein provided, be exercised by the Executive Council as thus constituted: *Provided, however,* That all appointments made by the governor, by and with the advice and consent of the Executive Council as thus constituted, in the Executive Council as authorized by section thirteen of this Act or in the office of Executive Secretary of Porto Rico, shall be regarded as temporary and shall expire not later than twenty days from and after the assembly and organization of the legislature hereinbefore provided, unless said appointments shall be ratified and made permanent by the said Senate of Porto Rico.

SEC. 57. That the laws and ordinances of Porto Rico now in force shall continue in force and effect, except as altered, amended, or modified herein, until altered, amended, or repealed by the legislative authority herein provided for Porto Rico or by Act of Congress of the United States; and such legislative authority shall have power, when not inconsistent with this Act, by due enactment to amend, alter, modify, or repeal any law or ordinance, civil or criminal, con- tinned in force by this Act as it may from time to time see fit.

SEC. 58. That all laws or parts of laws applicable to Porto Rico not in conflict with any of the provisions of this Act, including the laws relating to tariffs, customs, and duties on importations into Porto Rico prescribed by the Act of Congress entitled "An Act temporarily to provide revenues and a civil government for Porto Rico, and for other purposes," approved April twelfth, nineteen hundred, are hereby continued in effect, and all laws and parts of laws inconsistent with the provisions of this Act are hereby repealed.

Approved, March 2, 1917.

UNITED NATIONS CHARTER,
ratified by the United States Senate, July 28, 1945,
59 Stat. 1031, T.S. No. 993 (1945)

* * *

CHAPTER XI: DECLARATION REGARDING NON-SELF-GOVERNING TERRITORIES

Article 73

Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and, to this end:

a. to ensure, with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses;

b. to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement;

c. to further international peace and security;

d. to promote constructive measures of development, to encourage research, and to co-operate with one another and, when and where

appropriate, with specialized international bodies with a view to the practical achievement of the social, economic, and scientific purposes set forth in this Article; and

e. to transmit regularly to the Secretary-General for information purposes, subject to such limitation as security and constitutional considerations may require, statistical and other information of a technical nature relating to economic, social, and educational conditions in the territories for which they are respectively responsible other than those territories to which Chapters XII and XIII apply.

* * *

IN FAITH WHEREOF the representatives of the Governments of the United Nations have signed the present Charter. DONE at the city of San Francisco the twenty-sixth day of June, one thousand nine hundred and forty-five.

MEMORANDUM BY THE GOVERNMENT OF THE UNITED STATES OF AMERICA CONCERNING THE CESSATION OF TRANSMISSION OF INFORMATION UNDER ARTICLE 73 (e) OF THE CHARTER WITH REGARD TO THE COMMONWEALTH OF PUERTO RICO

Introduction

1. The United States Government, in pursuance of Article 73(e) of the Charter of the United Nations, has, in accordance with Resolution 66(I) adopted by the General Assembly of the United Nations on December 14, 1946, transmitted annually to the Secretary-General since 1946 information on Puerto Rico. During this period successive advances have been made in the growth and development of self-governing institutions in Puerto Rico and in the vesting of powers of government in the Puerto Rican people and their elected representatives. This process has reached its culmination with the establishment of the Commonwealth of Puerto Rico and the promulgation of the Constitution of this Commonwealth on July 25, 1952.

2. With the establishment of the Commonwealth of Puerto Rico, the people of Puerto Rico have attained a full measure of self-government. Accordingly, the Government of the United States has decided that it is no longer appropriate for it to submit information on Puerto Rico pursuant to Article 73(e) of the Charter.

3. Resolution 222(111), adopted by the General Assembly on November 3, 1948, states that, having regard to the provisions of Chapter XI of the Charter, it is essential that the United Nations be informed of

any change in the constitutional position and status of any non-self-governing territory as a result of which the responsible government concerned thinks it unnecessary to transmit information in respect of that territory under Article 73(e) of the Charter. The Members of the United Nations concerned are requested by this resolution to communicate to the Secretary-General, within a maximum period of six months, such information as may be appropriate, including the constitution, legislative act or executive order providing for the government of the territory and the constitutional relationship of the territory to the government of the metropolitan country.

4. As a result of the change in the constitutional position and status of Puerto Rico as described in this memorandum, the Government of the United States considers it unnecessary to transmit further information under Article 73(e) of the Charter concerning the Commonwealth of Puerto Rico. The United States Government desires that the United Nations be fully informed of the background of this decision. Accordingly, and in pursuance of Resolution 222(III), this memorandum has been prepared and, together with a copy of the Constitution of the Commonwealth of Puerto Rico and a letter from the Governor of Puerto Rico is transmitted to the Secretary-General for circulation to the Members of the United Nations for their information.

Constitutional Development of Puerto Rico Under United States Administration

5. Puerto Rico has been administered by the United States since 1898 when Spain ceded its

sovereignty to the island under terms of the Treaty of Paris. Puerto Rico had a military government until 1900 when the United States Congress enacted the first organic law providing for a civil form of government. The establishment of the Commonwealth in July 1952 marks the culmination of a steady progression in the exercise of self-government initiated by the first organic law.

6. The first organic law, known as the Foraker Act, provided for a Governor appointed by the President of the United States, with the advice and consent of the Senate of the United States, a legislative assembly in which the lower house was elected but the upper house was composed of the heads of executive departments of the government and five other persons, all appointed by the President with the advice and consent of the Senate; and a supreme court, the members of which were also appointed by the President with the advice and consent of the Senate, justices of the lower courts being appointed by the Governor with advice and consent of the upper house of the legislature. The act provided for Puerto Rico's representation before all departments of the Federal Government by a popularly elected Resident Commissioner. The Resident Commissioner has a seat in the House of Representatives of the Congress of the United States.

7. In 1917, the scope of self-government was increased with enactment by the Congress of a second organic law known as the Jones Act. Under it, the people of Puerto Rico elected both houses of their legislature, and the popularly elected upper house advised and consented to the Governor's

appointment of justices of the lower courts. The President retained authority to appoint the Governor, the justices of the supreme court, the heads of the departments of justice and education, and the auditor, but all other heads of executive departments were appointed by the Governor. The people of Puerto Rico became citizens of the United States. The protection of a bill of rights patterned on the bill of rights of the United States Constitution was extended to Puerto Rico. Provision for representation before the various departments of the Federal Government remained. The legislature could repass a bill over the Governor's veto, but if the Governor did not then approve it, it did not become law unless it received the approval of the President.

8. In 1946, the President appointed as Governor, with the advice and consent of the Senate, a Puerto Rican who had formerly been Resident Commissioner from Puerto Rico. This was the first time that a Puerto Rican had been appointed Governor.

9. In 1947, the Congress authorized the people of Puerto Rico to elect their Governor, beginning with the general election in 1948, and provided a line of succession in the event of a vacancy in the position of Governor or of the Governor's temporary absence or disability. The elected Governor was authorized to appoint all the members of his cabinet, the heads of the executive departments, including the attorney general and commissioner of education. No change was made at that time in the provisions respecting appointment of the auditor and justices of the supreme court.

Development and Adoption of the Constitution of the Commonwealth of Puerto Rico

10. In 1948, the candidates for Governor and Resident Commissioner from Puerto Rico, who were elected by very substantial majorities, ran on a platform calling for the adoption by the people of Puerto Rico of a constitution of their own drafting, within the framework of a continuing relationship with the United States to which the people of Puerto Rico would consent. In that election, the candidates who advocated statehood for Puerto Rico and independence for Puerto Rico were defeated. An overwhelming number of candidates for the legislature who ran on the same program as the successful candidates for Governor and Resident Commissioner were also elected. In accordance with the expressed wishes of the people of Puerto Rico, there was introduced in the Congress a bill to provide for the organization of a constitutional government by the people of Puerto Rico. It was enacted on July 3, 1950 as Public Law 600, 81st Cong. (64 Stat. 319).

11. That law expressly recognized the principle of government by consent, and declaring that it was "adopted in the nature of a compact", required that it be submitted to the voters of Puerto Rico in an island-wide referendum for acceptance or rejection. If the act were approved by a majority of participating voters, the Legislature of Puerto Rico was authorized to call a constitutional convention to formulate a constitution, which would become effective upon its adoption by the people if approved by the Congress after a finding by the President that it conformed with the applicable provisions of the act

and of the Constitution of the United States. Those provisions of the Organic Act which related to matters of local government would thereupon be repealed, while the remaining provisions of the Organic Act, relating to such matters as Puerto Rico's economic relationship to the United States, the force and effect of applicable Federal laws, and continued representation in Washington, would thenceforth be known as the Puerto Rican Federal Relations Act. The Congress made only two stipulations with respect to the content of the constitution to be adopted: that it provide a republican form of government and that it include a bill of rights.

12. Four political parties participated in the campaign preceding the referendum: two advocated approval of Public Law 600, 81st Congress, one opposed it, and one was divided in its position. On June 4, 1951, 506,185 persons, 65.08 percent of the 777,675 qualified voters of Puerto Rico, participated in the referendum, and 76.5 percent of those voting approved the act. On August 27, 1951, ninety-two delegates were elected to a constitutional convention, representing the Popular Democratic, the Statehood and the Socialist parties. The convention met in September 1951, and concluded its painstaking work in February 1952. An official English and an official Spanish version of the constitution were adopted, and the text was published in the four daily newspapers of Puerto Rico in both languages. Copies of the document were distributed throughout the Island.

13. On March 3, 1952, the constitution was submitted for adoption or rejection. Of the 783,610

qualified voters, 456,471 participated in the referendum. Of these, 373,594 or 81.84 percent of those voting supported adoption of the constitution; only 82,877 or 18.16 percent of those voting disapproved it. All of the elections and referenda held in Puerto Rico in connection with the development of the constitution were on the basis of universal adult suffrage without property or literacy requirements. Puerto Rico has had universal adult suffrage since 1929. There have been no property requirements since 1906 and the last literacy requirements were removed in 1935.

14. On April 22, 1952, the President transmitted the Constitution to the Congress with his recommendation for approval, and by Public Law 447, 82nd Cong. (66 Stat. 327), signed by the President on July 3, 1952, the Congress approved the Constitution subject to certain conditions which were to be submitted for approval to the Puerto Rican Constitutional Convention. Public Law 447, in its preambular provisions, recalled that the Act of July 3, 1950 "was adopted by the Congress as a compact with the people of Puerto Rico, to become operative upon its approval by the people of Puerto Rico"; that the people of Puerto Rico had overwhelmingly approved this Act and that the Constitution of Puerto Rico had been drafted by a Constitutional Convention; that the Constitution was adopted by the people of Puerto Rico in a referendum; that the President of the United States had declared that the Constitution conformed fully with the applicable provisions of the Act of July 3, 1950 and the Constitution of the United States, that it contained a Bill of Rights, and provided for a republican form of government; and that the Congress of the United

States had considered the Constitution and found that it conformed with the stipulated requirements. The operative part of the Public Law 447 recorded the approval by the Congress of the United States of the Constitution of the Commonwealth of Puerto Rico subject to certain conditions, among which was that the following new sentence be added to Article VII: "Any amendment or revision of this Constitution shall be consistent with the resolution enacted by the Congress of the United States approving this Constitution, with the applicable provisions of the Constitution of the United States, with the Puerto Rican Federal Relations Act, and with Public Law 600, 81st Cong. adopted in the nature of a compact." The Puerto Rican Constitutional Convention considered and approved these conditions. On July 25, 1952, the Governor of Puerto Rico proclaimed the establishment of the Commonwealth of Puerto Rico under its Constitution.

Principal Features of the Constitution of the Commonwealth

15. The Constitution of the Commonwealth, as it became effective with the approval of the Congress, provides that "Its political power emanates from the people and shall be exercised in accordance with their will, within the terms of the compact agreed upon between the people of Puerto Rico and the United States of America" (Art. I, Section 1). The Constitution of the Commonwealth is similar to that of a State of the Federal Union. It establishes a tri-partite form of government, with a popularly elected Governor, a popularly elected bi-cameral legislature and a judicial branch. The heads of all executive departments are appointed by the Governor, with the

advice and consent of the Puerto Rican Senate; appointment of the Secretary of State also requires the consent of the House of Representatives. It should be noted that with the establishment of the Commonwealth neither the President nor the United States Senate participates in any way in the appointment of any official of the government of the Commonwealth.

16. The Legislative Assembly, which is elected by free, universal and secret suffrage of the people of Puerto Rico, has full legislative authority in respect to local matters. The Commonwealth has the power to impose and collect taxes, and to contract debts. Acts of the Legislative Assembly become law upon approval of the Governor, or, in the event that an act is vetoed by the Governor, upon its reenactment by two-thirds of the total number of members of which each house is composed. The President may no longer prevent a bill repassed over the Governor's veto from becoming law by disapproving it. The protection of a bill of rights is extended to persons in Puerto Rico. All public officials must take an oath to support the Constitution of the United States and the Constitution and laws of the Commonwealth. Amendments to the Constitution may be proposed by the Legislative Assembly, and will be voted on at a referendum, becoming effective if ratified by a majority of the electors voting thereon. The Constitution does not restrict the substance of future amendments, except to provide that they shall be consistent with the act approving the Constitution, with the applicable provisions of the Federal Constitution with the Puerto Rican Federal Relations Act, and with the act of Congress

authorizing the drafting and adoption of a Constitution.

17. The judiciary of the Commonwealth is independent under the Constitution. The justices of the Supreme Court are no longer appointed by the President but are appointed by the Governor with the advice and consent of the Senate of Puerto Rico. Justices hold office during good behavior and may be removed, after impeachment, for causes specified in the Constitution. The number of justices may be increased only by law at the request of the court itself. No judge may make a direct or indirect financial contribution to any political organization or party, or hold any elective office therein, or participate in any political campaign or be a candidate for elective office unless he has resigned his judicial office at least six months prior to his nomination. Although judgments of the Supreme Court of Puerto Rico may be appealed to the United States Court of Appeals, decisions of the United States Supreme Court have established that the Supreme Court of Puerto Rico is the final authority on the meaning of a Puerto Rican law and that its decision interpreting such a law may not be reversed unless the interpretation is "inescapably wrong" and the decision "patently erroneous"; it is not sufficient to justify reversal that the Federal Court merely disagree with the Puerto Rican Supreme Court's interpretation. There continues to be a Federal District Court in Puerto Rico, but its jurisdiction does not differ from the jurisdiction of Federal District Courts functioning within the boundaries of States.

18. Under the Constitution, there is full and effective participation of the population of Puerto Rico in the Government of Puerto Rico. Article II, section 1, provides that no discrimination shall be made on account of race, color, sex, birth, social origin or condition, or political or religious ideas and requires the laws to embody these principles. Puerto Rico is divided by the Constitution into senatorial and representative districts for purposes of electing members of the Legislative Assembly, and provision is also made for election of senators and representatives elected at large. By a special procedure established by Article III of the Constitution, minority parties are assured of representation which recognizes their island-wide voting strength. Elections will be held every four years.

19. Article II, section 2, requires that the laws shall guarantee the expression of the will of the people by means of equal, direct, and secret universal suffrage and shall protect the citizen against any coercion in the exercise of the electoral franchise. Article VI, section 4, provides that every person over twenty-one years of age shall be entitled to vote if he fulfills the other conditions determined by law and prohibits depriving a person of the right to vote because he does not know how to read or write or does not own property.

Present Status of Puerto Rico

20. The people of Puerto Rico continue to be citizens of the United States as well as of Puerto Rico and the fundamental provisions of the Constitution of the United States continue to be applicable to Puerto Rico. Puerto Rico will continue to be

represented in Washington by a Resident Commissioner whose functions are not altered by the establishment of the Commonwealth. Matters of foreign relations and national defence will continue to be conducted by the United States, as is the case with the States of the Union.

21. At the request of the people of Puerto Rico and with the approval of the Government of the United States, Puerto Rico has voluntarily entered into the relationship with the United States which it has chosen to describe as a "commonwealth" relationship. The term "commonwealth" was adopted by Puerto Rico as the official English designation of the body politic created by the Constitution (the official Spanish title is "estado libre asociado"), to define the status of that body as "a state which is free of superior authority in the management of its own local affairs but which is linked to the United States of America and hence is a part of its political system in a manner compatible with its Federal structure", and which "does not have an independent and separate existence" (Resolution No. 22 of the Constitutional Convention). By the various actions taken by the Congress and the people of Puerto Rico, Congress has agreed that Puerto Rico shall have, under that Constitution, freedom from control or interference by the Congress in respect of internal government and administration, subject only to compliance with applicable provisions of the Federal Constitution, the Puerto Rican Federal Relations Act and the acts of Congress authorizing and approving the Constitution, as may be interpreted by judicial decision. Those laws which directed or authorized interference with matters of local government by the Federal Government have been repealed.

22. In Hawaii, Alaska, Guam and the Virgin Islands of the United States the chief executive is appointed by the President with the advice and consent of the Senate, not popularly elected by the people; the executive officer immediately subordinate to the Governor is appointed by the President, either alone or with the advice and consent of the Senate, but not by the Governor; and judges of the highest courts exercising local jurisdiction are appointed by the President with the advice and consent of the Senate, not by the Governor. This is so provided by their respective organic acts as enacted by the Congress. This is not the case with respect to Puerto Rico. The people of Puerto Rico will participate effectively in their government through universal, secret and equal suffrage, in free and periodic elections in which differing political parties offer candidates, and which are assured freedom from undemocratic practices by the Constitution itself. These elections will be conducted in the future, as they have been in the past, without interference by the United States. The people of Puerto Rico have complete autonomy in internal economic matters and in cultural and social affairs under a Constitution adopted by them and approved by the Congress.

23. Under the Puerto Rican Federal Relations Act, there will still be free trade with the United States, only United States coins and currency will be legal tender in Puerto Rico, and the statutory laws of the United States not locally inapplicable will, with some exceptions, have the same force and effect in Puerto Rico as in the United States. United States internal revenue laws do not apply in Puerto Rico, and the people of Puerto Rico will continue to be exempt from Federal income taxes on the income

they derive from sources within Puerto Rico. The proceeds of United States excise taxes collected on articles produced in Puerto Rico and shipped to the United States and the proceeds of customs collected on foreign merchandise entering Puerto Rico are covered into the Treasury of Puerto Rico for appropriation and expenditure as the legislature of the Commonwealth may decide.

24. The final declaration of the Constitutional Convention of Puerto Rico (Resolution No. 23), expresses the views of the people of Puerto Rico as to the status they have now achieved.

"When this Constitution takes effect, the people of Puerto Rico shall thereupon be organized into a commonwealth established within the terms of the compact entered into by mutual consent, which is the basis of our union with the United States of America.

Thus we attain the goal of complete self-government, the last vestiges of colonialism having disappeared in the principle of Compact, and we enter into an era of new developments in democratic civilization."

Conclusion

25. The United States Government, therefore, has decided that, with the entry into force on July 25, 1952, of the new constitutional arrangements establishing the Commonwealth of Puerto Rico, it is no longer appropriate for the United States to continue to transmit information to the United Nations on Puerto Rico under Article 73(e) of the Charter. This conclusion constitutes a recognition of the full measure of self-government which has been achieved by the people of Puerto Rico.

GENERAL ASSEMBLY RESOLUTION 748(VIII)

Cessation of the transmission of information under Article 73 e of the Charter in respect of Puerto Rico

The General Assembly,

Considering that, in resolution 222(III) of 3 November 1948, the General Assembly, while welcoming any development of self-government in Non-Self-Governing Territories, considers it essential that the United Nations be informed of any change in the constitutional status of any such Territory as a result of which the government responsible for the transmission, under Article 73 e of the Charter, of information in respect of that Territory thinks it unnecessary or inappropriate to continue such a practice,

Having received the communications[7] dated 19 January and 20 March 1953 informing the United Nations of the establishment of the Commonwealth of Puerto Rico, as a result of the entry into force on 25 July 1952 of the Constitution of Puerto Rico, and stating that, in consequence of these constitutional changes, the Government of the United States of America would cease to transmit information under Article 73 e of the Charter,

Having studied the report[8] prepared by the Committee on Information from Non-Self-Governing Territories, during its session of 1953, on the question of the cessation of the transmission of

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[7] See document A/AC.35/L.121.

[8] See *Official Records of the General Assembly, Eighth Session, Supplement No. 15*, part I, section VII.

information on Puerto Rico, and presented to the General Assembly in conformity with paragraph 2 of resolution 448 (V) of 12 December 1950,

Having examined the communications of the Government of the United States of America in the light of the basic principles embodied in Chapter XI of the Charter and of all the other elements of judgment pertinent to the issue,

Considering that the agreement reached by the United States of America and the Commonwealth of Puerto Rico, in forming a political association which respects the individuality and the cultural characteristics of Puerto Rico, maintains the spiritual bonds between Puerto Rico and Latin America and constitutes a link in continental solidarity,

Bearing in mind the competence of the General Assembly to decide whether a Non-Self-Governing Territory has or has not attained a full measure of self-government as referred to in Chapter XI of the Charter,

1. *Takes note favourably* of the conclusions set forth by the Committee on Information from Non-Self-Governing Territories in its resolution;[9]

2. *Recognizes* that the people of the Commonwealth of Puerto Rico, by expressing their will in a free and democratic way, have achieved a new constitutional status;

3. *Expresses the opinion* that it stems from the documentation provided that the association of the Commonwealth of Puerto Rico with the United

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[9] *Ibid.*, page 6.

States of America has been established as a mutually agreed association;

4. *Recognizes* that, when choosing their constitutional and international status, the people of the Commonwealth of Puerto Rico have effectively exercised their right to self-determination;

5. *Recognizes* that, in the framework of their Constitution and of the compact agreed upon with the United States of America, the people of the Commonwealth of Puerto Rico have been invested with attributes of political sovereignty which clearly identify the status of self-government attained by the Puerto Rican people as that of an autonomous political entity;

6. *Considers* that, due to these circumstances, the Declaration regarding Non-Self-Governing Territories and the provisions established under it in Chapter XI of the Charter can no longer be applied to the Commonwealth of Puerto Rico;

7 *Takes note* of the opinion of the Government of the United States of America as to the cessation of the transmission under Article 73 e of the Charter of information on Puerto Rico;

8. *Considers it appropriate* that the transmission of this information should cease;

9. *Expresses its assurance* that, in accordance with the spirit of the present resolution, the ideals embodied in the Charter of the United Nations, the traditions of the people of the United States of America and the political advancement attained by the people of Puerto Rico, due regard will be paid to the will of both the Puerto Rican and American peoples in the conduct of their relations under their

present legal statute, and also in the eventuality that either of the parties to the mutually agreed association may desire any change in the terms of this association.

459th plenary meeting,
27 November 1953.

NOV 16 2015

No. 15-108

IN THE
Supreme Court of the United States

THE COMMONWEALTH OF PUERTO RICO,

Petitioner,

v.

LUIS M. SÁNCHEZ VALLE AND
JAIME GÓMEZ VÁZQUEZ,

Respondents.

On Writ of Certiorari to the Supreme Court of Puerto Rico

BRIEF FOR PETITIONER

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November 16, 2015

QUESTION PRESENTED

Whether the Commonwealth of Puerto Rico and the Federal Government are separate sovereigns for purposes of the Double Jeopardy Clause of the United States Constitution.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner, the Commonwealth of Puerto Rico, was respondent in the Puerto Rico Supreme Court.

Respondents, Luis M. Sánchez Valle and Jaime Gómez Vázquez, were petitioners in the Puerto Rico Supreme Court.

René Rivero Betancourt and Rafael A. Delgado Rodríguez were defendants below but did not participate in the proceedings before the Puerto Rico Supreme Court.

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INTRODUCTION

This case calls upon the Court to clarify the application of the Double Jeopardy Clause of the United States Constitution to the Commonwealth of Puerto Rico. That Clause, as this Court has long held, protects a defendant from successive prosecutions by the *same* sovereign, but not by a *different* sovereign. Overruling its own longstanding precedent, a divided Puerto Rico Supreme Court held below that Puerto Rico and the Federal Government are a single sovereign because Puerto Rico is not a State. Thus, according to that court, the federal Double Jeopardy Clause limits the Commonwealth's ability to enforce its *own* laws in its *own* courts against a defendant who has been tried, acquitted, or convicted under *federal* law in *federal* court.

The Puerto Rico Supreme Court thereby erred. Just because Puerto Rico is not a State does not mean that it is an arm of the Federal Government. In the federal double jeopardy context, as this Court has long explained, whether two entities are separate sovereigns turns on the source of authority for each entity's laws. Insofar as those laws emanate from different sources of authority, the two entities cannot be deemed to have created the "same offense," and each entity may thus prosecute a defendant under its own laws without raising any federal double jeopardy concerns.

This case thus boils down to the question whether Puerto Rico law emanates from a different source of authority than federal law. The answer to that question is plainly "yes." Puerto Rico law emanates from authority delegated by the people of Puerto Rico, who engaged in an exercise of popular

sovereignty in 1952 by adopting their *own* Constitution establishing their *own* government to enact their *own* laws. The Commonwealth of Puerto Rico is a creature of the people of Puerto Rico, not of Congress. That point resolves this case.

To be sure, Congress authorized and ratified that exercise of popular sovereignty by the people of Puerto Rico. But that does not mean that the Puerto Rico Constitution and the laws enacted thereunder emanate from Congress. To the contrary, the authorizing legislation, Public Law 600 of 1950, proposed a "compact" under which "*the people of Puerto Rico* may organize a government pursuant to a constitution of their *own* adoption." Pub. L. No. 81-600, 64 Stat. 319 (1950), Pet. App. 353a (emphasis added). The people of Puerto Rico accepted that compact and adopted their own Constitution. And Congress ratified that compact by approving the Puerto Rico Constitution. *See* Pub. L. No. 82-447, 66 Stat. 327 (1952), Pet. App. 355-57a.

The Puerto Rico Constitution, thus, is not an act of Congress; rather, it is a democratic manifestation of the will of the people of Puerto Rico. Indeed, the Constitution makes that point clear on its face. Its opening words specify that it was adopted by "[w]e, the people of Puerto Rico ... in the exercise of our natural rights," and that "the will of the people is the source of public power." P.R. Const. pmbl., Pet. App. 358a. To attribute the Puerto Rico Constitution to Congress, instead of the people of Puerto Rico, is thus "to impute to the Congress the perpetration of ... a monumental hoax." *Figueroa v. People of Puerto Rico*, 232 F.2d 615, 620 (1st Cir. 1956).

Because the Constitution and laws of Puerto Rico emanate from authority delegated by the people of Puerto Rico, not from Congress, the federal Double Jeopardy Clause poses no barrier to successive prosecutions under federal and Commonwealth law. Accordingly, this Court should reverse the judgment.

OPINIONS BELOW

The opinion of the Supreme Court of Puerto Rico is reported in the original Spanish at 2015 TSPR 25, 2015 WL 1317010, and a certified English translation is reprinted in the Petition Appendix ("Pet. App.") at 1-242a. The opinion of the Court of Appeals of Puerto Rico is unreported, and a certified English translation is reprinted at Pet. App. 243-306a. The opinions of the trial court dismissing the indictments against respondents Sánchez Valle and Gómez Vázquez are unreported, and certified English translations are reprinted at Pet. App. 307-29a and 330-52a respectively.

JURISDICTION

The Puerto Rico Supreme Court issued its decision on March 20, 2015. Pet. App. 1a. On June 5, 2015, Justice Breyer extended the time within which to file a petition for a writ of certiorari to and including July 20, 2015. Petitioner filed a timely petition for certiorari on July 17, 2015, which this Court granted on October 1, 2015. This Court has jurisdiction under 28 U.S.C. § 1258.

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Double Jeopardy Clause of the United States Constitution provides that "[n]o person shall be ...

subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V.

The Territorial Clause of the United States Constitution provides in relevant part that "[t]he Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory ... belonging to the United States." U.S. Const. art. IV, § 3, cl. 2.

Public Law 600 of 1950 (entitled "An Act to provide for the organization of a constitutional government by the people of Puerto Rico"), Pub. L. No. 81-600, 64 Stat. 319 (1950), codified at 48 U.S.C. § 731 *et seq.*, Public Law 447 of 1952 (entitled "Joint Resolution approving the constitution of the Commonwealth of Puerto Rico which was adopted by the people of Puerto Rico on March 3, 1952"), Pub. L. No. 82-447, 66 Stat. 327 (1952), and excerpts of the Puerto Rico Constitution are reproduced in the appendix to the petition. *See* Pet. App. 353-62a.

The Treaty of Paris, under which the Kingdom of Spain ceded Puerto Rico to the United States, *see* Treaty of Peace between the United States of America and the Kingdom of Spain, 30 Stat. 1754, T.S. No. 343 (1899), and the two organic acts under which the United States established a civil government in Puerto Rico before the adoption of the Puerto Rico Constitution—the Foraker Act, *see* Organic Act of 1900, Ch. 191, 56th Cong., 1st Sess., 31 Stat. 77 (1900), and the Jones Act, *see* Organic Act of 1917, Pub. L. No. 64-368, 39 Stat. 951 (1917)—are reproduced in the Joint Appendix. *See* JA56-66, 67-89, 90-131. So too are Article 73 of the United Nations Charter, the Memorandum by the United States Government to the United Nations General

Assembly regarding the cessation of information on Puerto Rico under that Article, and General Assembly Resolution 748 responding to that Memorandum. *See* JA132-33, 134-47, 148-51.

STATEMENT OF THE CASE

A. Background

The United States gained possession of Puerto Rico during the Spanish-American War of 1898, and Spain formally ceded the island under the Treaty of Paris signed in December 1898 and ratified in April 1899. *See* Treaty of Peace between the United States of America and the Kingdom of Spain, 30 Stat. 1754, T.S. No. 343 (1899), JA56-66.

After a brief period of military rule, Congress enacted an organic act (widely known as the Foraker Act) to establish a civil government in Puerto Rico. *See* Organic Act of 1900, Ch. 191, 56th Cong., 1st Sess., 31 Stat. 77 (1900), JA67-89. That Act provided for an Executive Branch headed by a Governor appointed by the President with the advice and consent of the United States Senate, a bicameral legislature in which the lower house was elected by qualified voters of Puerto Rico and the upper house was composed of the heads of the executive departments and five other persons appointed by the President with the advice and consent of the United States Senate, and a Judicial Branch composed of a Supreme Court appointed by the President with the advice and consent of the United States Senate and lower courts appointed by the Governor with the advice and consent of the legislature. *See id.* §§ 17, 27, 33, JA75-76, 79, 83-84. The Act further specified that all laws enacted by the Puerto Rico legislature

must be submitted to Congress, which retained the power to annul them. *See id.* § 31, JA81-82.

The Foraker Act was replaced in 1917 by a new organic act (widely known as the Jones Act), which created an elected Senate and gave the people of Puerto Rico a bill of rights and United States citizenship. *See* Organic Act of 1917, Pub. L. No. 64-368, 39 Stat. 951 (1917), JA90-131. As under the Foraker Act, all laws enacted by the Puerto Rico legislature continued to be submitted to Congress, which retained the power to annul them. *See id.* § 34, JA113-14.

As pro-democratic and anti-colonial movements swept the globe after the Second World War, the United States signed and ratified the United Nations Charter. *See* 59 Stat. 1031, T.S. No. 993 (1945). Under Article 73 of that Charter, the United States assumed a treaty obligation to "develop self-government" in its non-self-governing territories, and to assist the people of such territories "in the progressive development of their free political institutions," and "to transmit regularly to the Secretary-General ... information ... relating to economic, social, and educational conditions" in such territories. United Nations Charter art. 73, JA132-33. Pursuant to that obligation, the United States submitted annual reports on Puerto Rico to the U.N. Secretary General beginning in 1946. *See* United States of Am., *Memorandum Concerning the Cessation of Information Under Article 73(e) of the Charter with regard to the Commonwealth of Puerto Rico*, 28 Dept. of State Bull. 584 (Mar. 20, 1953) (*U.S. Mem. to U.N.*), JA134.

Meanwhile, pressures for greater autonomy led Congress to revisit the governance of Puerto Rico. In 1947, Congress amended the Jones Act to give qualified voters of Puerto Rico the right to elect their own Governor, *see* Pub. L. No. 80-362, 61 Stat. 770 (1947)—a right never previously accorded to any territory of the United States, *see* Calvert Magruder, *The Commonwealth Status of Puerto Rico*, 15 U. Pitt. L. Rev. 1, 7 (1953).

And in 1950, Congress enacted the pathmarking Public Law 600. *See* Pub. L. No. 81-600, 64 Stat. 319, Pet. App. 353-54a. That statute, "[f]ully recognizing the principle of government by consent," offered the people of Puerto Rico "in the nature of a compact" the authority to "organize a government pursuant to a constitution of their own adoption." Pet. App. 353a (codified at 48 U.S.C. § 731b). Upon approval of the statute by the qualified voters of Puerto Rico in a referendum, the legislature was authorized to call a constitutional convention to draft a constitution for Puerto Rico. *See id.* (codified at 48 U.S.C. § 731c).

In a popular referendum held on June 4, 1951, the people of Puerto Rico overwhelmingly accepted the "compact" offered by Congress, and a Constitutional Convention was held from September 1951 to February 1952. Pet. App. 355a. That Convention drafted the Puerto Rico Constitution. *See id.* The proposed Constitution was then submitted to the people of Puerto Rico and again overwhelmingly approved (with over 80% of the vote) in another popular referendum on March 3, 1952. *See id.*

The Puerto Rico Constitution is ordained and established by "[w]e, the people of Puerto Rico ... in

the exercise of our natural rights." P.R. Const. pmbl., Pet. App. 358a. It creates a new political entity, the Commonwealth of Puerto Rico ("*Estado Libre Asociado de Puerto Rico*"), and specifies that the Commonwealth's "political power *emanates from the people* and shall be exercised in accordance with their will, within the terms of the compact agreed upon between the people of Puerto Rico and the United States of America." P.R. Const. art. I, § 1, Pet. App. 359a (emphasis added); *see also id.* pmbl., Pet. App. 358a ("We understand that the democratic system of government is one in which the will of the people is the source of public power."). It divides the Commonwealth's political power between officials in the "legislative, judicial and executive branches" of the new government, none of the members of which are appointed by the President of the United States or any other arm of the Federal Government. P.R. Const. art. I, § 2; art. III, § 1; art. IV, § 1; art. V, §§ 1, 8; art. VI, § 4, Pet. App. 359-62a. Instead, all three branches of the government of the Commonwealth are "subordinate to the sovereignty of the people of Puerto Rico." P.R. Const. art. I, § 2, Pet. App. 359a.

Pursuant to Public Law 600, the Constitution was then submitted to the President of the United States, who—after duly finding, among other things, that it provided for a republican form of government—in turn submitted it to Congress for review. Pet. App. 353-56a; *see generally* 48 U.S.C. §§ 731c, d. Congress confirmed that Public Law 600 "was adopted by the Congress as a compact with the people of Puerto Rico, to become operative upon its approval by the people of Puerto Rico." Pub. L. No. 82-447, 66 Stat. 327, Pet. App. 355a. Congress then considered the proposed Constitution, likewise found (among other

things) that it provided for a republican form of government, and approved it conditioned on minor revisions to provisions addressing compulsory school attendance and the process for constitutional amendments as well as the elimination of section 20 recognizing a number of then-novel human rights. *See id.*, Pet. App. 356-57a. The Senate Report accompanying the legislation explained that the Constitution's approval would mean "the people of Puerto Rico will exercise self-government." S. Rep. No. 82-1720, at 6, 7 (1952). President Truman echoed that view both when transmitting the Puerto Rico Constitution to Congress and when signing the Joint Resolution by which Congress approved the Constitution. Under the new Constitution, in President Truman's view, "full authority and responsibility of local self-government will be vested in the people of Puerto Rico." *Public Papers of the Presidents, Harry S. Truman 1952-53*, at 287, 471 (1966).

Puerto Rico's Constitutional Convention thereafter accepted Congress' conditions "in the name of the people of Puerto Rico," *Resolution No. 34 of the Constitutional Convention: To Accept, in Behalf of the People of Puerto Rico, the Conditions of Approval of the Constitution of the Commonwealth of Puerto Rico Proposed by the Eighty-Second Congress of the United States through Public Law 447 approved July 3, 1952*, July 10, 1952, P.R. Laws Ann. Hist. (Hist. L.P.R.A.) § 9, and the Governor issued a formal proclamation to that effect, *see Proclamation: Establishing the Commonwealth of Puerto Rico*, July 25, 1952, P.R. Laws Ann. Hist. (Hist. L.P.R.A.) § 10. The Puerto Rico Constitution thus took effect on July 25, 1952, *see* 48 U.S.C. § 731d Note—a day still

celebrated yearly in the Commonwealth as Constitution Day. The amendments were overwhelmingly ratified by the people of Puerto Rico in yet another referendum on November 4, 1952. *See generally Proclamation: Amendments to the Constitution of the Commonwealth of Puerto Rico*, Jan. 29, 1953, P.R. Laws Ann. Hist. (Hist. L.P.R.A.) § 11. As a result, numerous provisions of the organic acts that had previously governed Puerto Rico—including provisions giving Congress the authority to review and annul Puerto Rico laws—were repealed, and the remaining provisions were renamed the Federal Relations Act. *See* Pub. L. No. 81-600 §§ 4, 5, 64 Stat. at 319-20, Pet. App. 354a.

Shortly thereafter, the United States informed the United Nations General Assembly that it no longer considered itself bound to provide reports on conditions in Puerto Rico under article 73 of the U.N. Charter. *See U.S. Mem. to U.N.*, JA134-47. As the United States explained, in light of the 1952 Constitution, Puerto Rico had become a fully self-governing jurisdiction. *See id.*; *see generally* Magruder, *Commonwealth Status*, 15 U. Pitt. L. Rev. at 12-13. In response, the U.N. General Assembly recognized that "the people of the Commonwealth of Puerto Rico, by expressing their will in a free and democratic way, have achieved a new constitutional status," and "have effectively exercised their right to self-determination." General Assembly Resolution 748 (VIII), U.N. GAOR, 8th Sess., 459th plen. mtg. at 26 (Nov. 27, 1953), JA149-50; *see also* JA150 ("[I]n the framework of their Constitution and of the compact agreed upon with the United States of America, the people of the Commonwealth of Puerto Rico have been invested with attributes of political

sovereignty which clearly identify the status of self-government attained by the Puerto Rican people as that of an autonomous political entity.").

The Puerto Rico Constitution, as noted above, vests "[t]he legislative power ... in a Legislative Assembly," which consists of two houses, the Senate and the House of Representatives, whose members are elected by the people of Puerto Rico. P.R. Const. art. III, § 1, Pet. App. 360a. All the laws of Puerto Rico—including the criminal laws—are enacted pursuant to that power. Indeed, the Constitution specifies that "[a]ll criminal actions in the courts of the Commonwealth shall be conducted in the name and *by the authority* of 'The People of Puerto Rico.'" P.R. Const. art. VI, § 18, Pet. App. 362a (emphasis added). Thus, like the States, Puerto Rico is subject to two different criminal justice systems—one established by its own laws and enforced by its own prosecutors, and the other established by Congress and enforced by federal prosecutors.

B. Proceedings Below

On September 28, 2008, Puerto Rico prosecutors indicted respondent Luis Sánchez Valle for (1) the illegal sale of firearms and ammunition without a license, in violation of P.R. Laws Ann. tit. 25, § 458, and (2) the illegal carrying of a firearm, in violation of P.R. Laws Ann. tit. 25, § 458c. *See* JA11-14; *see also* Pet. App. 2a. Subsequently, while that Commonwealth prosecution was pending, a federal grand jury also indicted Sánchez Valle for the illegal sale of firearms and ammunition without a license. *See* JA15-20; *see also* 18 U.S.C. §§ 922(a)(1)(A), 923(a), 924(a)(1)(D), 924(a)(2). Sánchez Valle pleaded guilty to the federal charges and received a

five-month prison sentence followed by five months' house arrest and three years' supervised release. *See* JA21-30; *see also* Pet. App. 2-3a.

After pleading guilty to the federal charges, Sánchez Valle moved to dismiss the pending prosecution in the Commonwealth court—for which he was subject to a much longer sentence—as a violation of his rights under the Double Jeopardy Clause of the Federal Constitution. The trial court agreed and dismissed the charges. *See* Pet. App. 307-29a.

Similarly, on September 28, 2008, Puerto Rico prosecutors indicted respondent Jaime Gómez Vázquez for (1) the illegal sale of a firearm without a license, *see* P.R. Laws Ann. tit. 25, § 458, (2) the illegal carrying of a rifle, *see id.* § 458f, and (3) the illegal transfer of a mutilated weapon, *see id.* § 458i. *See* JA31-34, Pet. App. 3-4a. As with Sánchez Valle, a federal grand jury subsequently indicted Gómez Vázquez for selling firearms in interstate commerce without a license. JA35-43; *see also* Pet. App. 4a. He pleaded guilty to the federal charges and received an eighteen-month prison sentence followed by three years' supervised release. *See* JA44-55; *see also* Pet. App. 4-5a.

Gómez Vázquez, like Sánchez Valle, then moved to dismiss his pending prosecution in the Commonwealth court—for which, again like Sánchez Valle, he was subject to a much longer sentence—as a violation of his rights under the Double Jeopardy Clause of the Federal Constitution. Once again, the trial court agreed and dismissed the charges. *Id.* at 330-52a.

The Commonwealth appealed both dismissals to the Puerto Rico Court of Appeals, and that court reversed. *Id.* at 243-306a. As the court explained, the double jeopardy issue in the case was controlled by the Puerto Rico Supreme Court's decision in *People v. Castro García*, 20 P.R. Offic. Trans. 775 (1988), which held that the Commonwealth of Puerto Rico and the Federal Government are separate sovereigns for double jeopardy purposes, thus removing any double jeopardy bar to a subsequent prosecution by the other sovereign. Pet. App. 262a, 267-77a, 279-81a. Judge Medina Monteserín concurred on the ground that *Castro García* "prevails at this time in our jurisdiction," but expressed her view that "there is room to review and discuss said caselaw." Pet. App. 284a. Judge González Vargas also filed a separate statement underscoring his view that the authority for Puerto Rico's criminal laws "emanates ... from the People of Puerto Rico through their Constitution, which was democratically adopted as the ultimate expression of their will in the exercise of their self-government attributes," and that "[i]t is legally unacceptable and contrary to the dignity of every Puerto Rican to argue that even the adoption of their criminal laws and the indictment for the violation of same are merely the result of gifts or graces by the People of the United States, as if we found ourselves in the times of the crudest colonial regime." Pet. App. 304a.

The Puerto Rico Supreme Court granted respondents' petitions for certiorari and consolidated the cases. The Court began by analyzing whether each of the various crimes with which respondents were charged under Puerto Rico law was, for federal double jeopardy purposes, the "same offence" to

which they had pleaded guilty under federal law. *See* Pet. App. 7-10a. To that end, the Court applied this Court's "same-elements" test. *See id.* (citing *Blockburger v. United States*, 284 U.S. 299, 304 (1932)). With respect to the crime of selling a firearm or ammunition without a license, the Court held that the Puerto Rico crime is a lesser-included offense of its federal counterpart because the elements of both crimes are identical other than the additional interstate-commerce requirement of the federal crime. *See id.* at 8-10a. Accordingly, the Court held that, under *Blockburger*, the Commonwealth and federal crimes are the "same offence" for federal double jeopardy purposes. *See id.* at 9-10a. The remaining crimes with which respondents were charged under Puerto Rico law did not raise double jeopardy concerns, however, because respondents had not been charged with analogous federal offenses. *See id.* at 10a. None of the Justices expressed any disagreement on these issues.

The Justices divided sharply, however, on the question whether the Commonwealth could nevertheless prosecute respondents for the "same offence" to which they had pleaded guilty in federal court. The majority held that it could not, on the theory that the Commonwealth of Puerto Rico and the Federal Government are a single sovereign for federal double jeopardy purposes. In particular, the majority held, "Puerto Rico's authority to prosecute individuals is derived from its delegation by United States Congress and not by virtue of its own sovereignty." *Id.* at 65a (emphasis omitted); *id.* at 66a ("[T]he Commonwealth of Puerto Rico is not a sovereign entity inasmuch as, being a territory, its ultimate source of power to prosecute offenses is

derived from the United States Congress.") (emphasis omitted). Unless and until Puerto Rico becomes a State, in the majority's view, the dual sovereignty doctrine does not apply. *See id.* at 67-68a. The majority thus overruled its contrary holding in *Castro García* as "clearly erroneous," reversed the Court of Appeals' judgment with respect to the charges against respondents under Commonwealth law for the illegal sale of firearms and ammunition without a license, and ordered the dismissal of those charges. *Id.* at 69a.

Chief Justice Fiol Matta, joined by Justice Oronoz Rodríguez, concurred in the judgment. *See id.* at 71-190a. The Chief Justice sharply disagreed with the majority's application of the dual sovereignty doctrine as a matter of federal constitutional law. *Id.* at 72-73a. In her view, "the drafting and ratification of our Constitution by the People of Puerto Rico was not a marginal and insignificant event, as the Majority insists," but rather an exercise of popular sovereignty. *Id.* at 131a. Thus, even though Puerto Rico is not a State, its "ultimate source of power and authority to create and punish crimes has been the People of Puerto Rico" ever since the Puerto Rico Constitution took effect in 1952. *Id.* at 132a. She thus concluded that the Double Jeopardy Clause of the Federal Constitution did not bar respondents' prosecution by both Puerto Rico and federal authorities. *Id.* at 156-57a. Nonetheless, the Chief Justice would have held that Puerto Rico should not recognize the dual sovereignty doctrine for purposes of its *own* constitutional prohibition on Double Jeopardy, *see* P.R. Const. art. II, § 11, Pet. App. 360a, and thus would have granted respondents relief under the Puerto Rico Constitution, *id.* at 164-90a.

Justice Rodríguez Rodríguez wrote a scathing dissent that also rejected the majority's federal dual sovereignty analysis. *See id.* at 191-242a. She accused the majority of elevating its "ideological" views regarding Puerto Rico statehood over legal analysis. *Id.* at 241a. The majority's legal analysis, according to Justice Rodríguez Rodríguez, is "incompatible with" this Court's dual sovereignty jurisprudence. *Id.* at 195a; *see also id.* at 241-42a. She accordingly called upon "the United States Supreme Court to intervene in this case to bring the majority of this Court back to the fold of the United States Constitution." *Id.* at 196a.

The Commonwealth timely petitioned for a writ of certiorari, which this Court granted on October 1, 2015.

SUMMARY OF ARGUMENT

The Double Jeopardy Clause of the Federal Constitution protects a defendant from being twice put in jeopardy for "the same offence." U.S. Const. amend. V. As this Court has long recognized, offenses established by two different sovereigns cannot be characterized as the "same" offense within the meaning of that provision, because each sovereign has the right to define and punish its *own* offenses without interference by another sovereign. *See, e.g.*, *Heath v. Alabama*, 474 U.S. 82, 87-90 (1985).

The Puerto Rico Supreme Court held below that the Commonwealth of Puerto Rico and the Federal Government are a single sovereign under the Double Jeopardy Clause, so that the Clause limits the Commonwealth's ability to enforce its own law against a defendant who has been tried, acquitted, or

convicted under federal law. According to that court, Puerto Rico does not qualify as a separate sovereign for federal double jeopardy purposes because it remains subject to congressional authority under the Territorial Clause, U.S. Const. art. IV, § 3, cl. 2.

The court reached the wrong answer because it focused on the wrong question. As this Court has long explained, the dual-sovereignty inquiry does not turn on the *extent* of authority of one entity over another, but instead on the *source* of authority of each entity's laws. *See, e.g.*, *United States v. Wheeler*, 435 U.S. 313, 319-20 (1978). Focusing on Congress' authority over Puerto Rico under the Territorial Clause thus misses the point. What matters here is that the laws of Puerto Rico emanate from authority delegated by the people of Puerto Rico through their own Constitution, not authority delegated by Congress.

There is no way to characterize the Puerto Rico Constitution as an act of Congress. To the contrary, Public Law 600 of 1950 offered the people of Puerto Rico a "compact" under which they could "organize a government pursuant to a constitution of their *own* adoption." Pub. L. No. 81-600, 64 Stat. at 319 (emphasis added). The people of Puerto Rico overwhelmingly accepted that compact, and convened a Constitutional Convention that drafted the Puerto Rico Constitution, which the people of Puerto Rico in turn overwhelmingly approved. That Constitution is ordained and established by "[w]e, the people of Puerto Rico," and creates a new political entity, the Commonwealth of Puerto Rico, that is "subordinate to the sovereignty of the people of Puerto Rico." P.R. Const. pmbl., art. I, § 2, Pet.

App. 358-59a. After ensuring, among other things, that this Constitution provided a republican form of government, Congress approved the Constitution conditioned on certain minor changes. *See* Pub. L. No. 82-447, 66 Stat. at 327-28, Pet. App. 355-57a. And after the Puerto Rico Constitutional Convention formally accepted those conditions "in the name of the people of Puerto Rico," and the Governor issued a proclamation, the Puerto Rico Constitution took effect on July 25, 1952. Since that day, the laws of Puerto Rico (including the criminal laws at issue here) have emanated from sovereign authority delegated by the people of Puerto Rico, not from Congress.

It follows that the Puerto Rico Supreme Court erred by holding that Puerto Rico and the Federal Government are a single sovereign for federal double jeopardy purposes. Accordingly, this Court should reverse the judgment.

ARGUMENT

The Commonwealth Of Puerto Rico And The Federal Government Are Separate Sovereigns For Purposes Of The Double Jeopardy Clause Of The United States Constitution.

The Puerto Rico Supreme Court erred by holding that the Commonwealth of Puerto Rico and the Federal Government are a single sovereign for federal double jeopardy purposes, so that a trial, acquittal, or conviction under the laws of one limits a subsequent prosecution under the laws of the other. The Commonwealth and the Federal Government are separate sovereigns for federal double jeopardy purposes because their laws emanate from different sources: the Commonwealth's laws emanate from the

people of Puerto Rico through the Puerto Rico Constitution, which vests legislative power in the Puerto Rico Legislature, while federal laws emanate from the people of the United States through the Federal Constitution, which vests legislative power in Congress. Accordingly, there is no federal double jeopardy bar to successive prosecution under the laws of the United States and the laws of Puerto Rico.

A. The Federal Double Jeopardy Clause Generally Applies To Puerto Rico.

As a threshold matter, there is no dispute here that the Double Jeopardy Clause applies to Puerto Rico as a general matter. Although the so-called *Insular Cases* of the early twentieth century hold that the Federal Constitution does not necessarily apply of its own force to the Nation's insular possessions in the same manner that it applies to the States and mainland territories, *see, e.g.*, *Balzac v. Porto Rico*, 258 U.S. 298, 305, 312 (1922); *Dorr v. United States*, 195 U.S. 138, 142-49 (1904); *Downes v. Bidwell*, 182 U.S. 244, 293 (1901) (White, J., concurring in the judgment); *cf. Boumediene v. Bush*, 553 U.S. 723, 756-59 (2008) (describing the *Insular Cases*); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 268 (1990) (same), that proposition has no bearing here.

Whatever the merits of the *Insular Cases*, they recognize that "guaranties of certain fundamental personal rights declared in the Constitution, as, for instance, that no person could be deprived of life, liberty, or property without due process of law," apply to the Nation's insular possessions. *Balzac*, 258 U.S. at 312-13; *see also Boumediene*, 553 U.S. at

758-59; *Verdugo-Urquidez*, 494 U.S. at 268-69. Thus, as this Court has recognized, there can be no doubt that "Puerto Rico is subject to ... the Due Process Clause of either the Fifth or the Fourteenth Amendment." *Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328, 331 n.1 (1986) (citing *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 668-69 n.5 (1974)); *see also Rodríguez v. Popular Democratic Party*, 457 U.S. 1, 7-8 (1982); *Torres v. Puerto Rico*, 442 U.S. 465, 468-70 (1979); *Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 599-601 & n.30 (1976).

In light of this Court's holding that "the double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage," and is thus incorporated into the Due Process Clause of the Fourteenth Amendment, *Benton v. Maryland*, 395 U.S. 784, 793-96 (1969), there appears to be no basis to dispute that the Double Jeopardy Clause applies in Puerto Rico. *Cf. Torres*, 442 U.S. at 475-76 (Brennan, J., joined by Stewart, Marshall, and Blackmun, JJ., concurring in the judgment) ("Whatever the validity of the [*Insular Cases*] in the particular historical context in which they were decided, those cases are clearly not authority for questioning the application of the Fourth Amendment—or any other provision of the Bill of Rights—to the Commonwealth of Puerto Rico in the 1970's.").[1]

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[1] In the early years of the last century, this Court applied federal double jeopardy principles to criminal prosecutions in the Philippine Islands, which were then a United States territory. *See Grafton v. United States*, 206 U.S. 333, 354-55

Certainly, Congress has never suggested that federal double jeopardy protections do not apply to Puerto Rico as a general matter; to the contrary, the Jones Act, which established the framework for the governance of Puerto Rico before the establishment of the Commonwealth in 1952, expressly provided federal protection against double jeopardy. *See* Pub. L. No. 64-368 § 2 cl. 3, 39 Stat. at 951, JA90; *cf. Torres*, 442 U.S. at 470 (noting that "a legislative determination that a constitutional provision practically and beneficially may be implemented in a territory is entitled to great weight"). Indeed, the Commonwealth has never disputed in this litigation that, as a general matter, the federal Double Jeopardy Clause applies to Puerto Rico.

(1907); *Kepner v. United States*, 195 U.S. 100, 121-34 (1904). In each of those cases, however, the Court based its decision on an act of Congress providing for the temporary administration of a civilian government in the Philippine Islands, which provided that "'no person, for the same offense, shall be twice put in jeopardy of punishment.'" *Grafton*, 206 U.S. at 345 (quoting Act of July 1, 1902, Ch. 1369, 57th Cong., 1st Sess., 32 Stat. 691, 692 (1902)); *see also Kepner*, 195 U.S. at 124. In light of that statute, those cases expressly declined to address whether the Double Jeopardy Clause applied of its own force in the Philippine Islands. *See Grafton*, 206 U.S. at 345; *Kepner*, 195 U.S. at 124. Similarly, in *Puerto Rico v. Shell Co. (P.R.)*, 302 U.S. 253, 264 (1937), this Court suggested in dictum that federal double jeopardy principles apply in Puerto Rico, but again did not address the question whether the Double Jeopardy Clause applies of its own force in Puerto Rico. Rather, the *Shell* Court noted that "Section 2 (the Bill of Rights) of the Puerto Rico Organic Act of 1917 ... provides that 'no person for the same offense shall be twice put in jeopardy of punishment.'" 302 U.S. at 264 n.2 (quoting Pub. L. No. 64-368 § 2, 39 Stat. at 951).

B. The Federal Double Jeopardy Clause Does Not Prevent Successive Prosecution By Separate Sovereigns.

What the Commonwealth *has* disputed, and vigorously, in this litigation is whether the federal Double Jeopardy Clause limits Puerto Rico's ability to prosecute a defendant who has been tried, acquitted, or convicted by the Federal Government (and vice versa). Under this Court's precedents dating back well into the nineteenth century, it has been settled that the Double Jeopardy Clause bars successive prosecution by the *same* sovereign, but does not apply to successive prosecution by *different* sovereigns. *See, e.g.*, *United States v. Lara*, 541 U.S. 193, 197, 199 (2004); *Heath*, 474 U.S. at 87-88; *Wheeler*, 435 U.S. at 320; *Abbate v. United States*, 359 U.S. 187, 193-94 (1959); *Bartkus v. Illinois*, 359 U.S. 121, 128-39 (1959); *Hebert v. Louisiana*, 272 U.S. 312, 314 (1926); *United States v. Lanza*, 260 U.S. 377, 382 (1922); *Cross v. North Carolina*, 132 U.S. 131, 139 (1889); *Ex parte Siebold*, 100 U.S. 371, 389-91 (1879); *Moore v. Illinois*, 55 U.S. (14 How.) 13, 19-20 (1852); *Fox v. Ohio*, 46 U.S. (5 How.) 410, 435 (1847).

The reason for that venerable rule is simple: because a crime is an offense against a particular sovereign, "[w]hen a defendant in a single act violates the 'peace and dignity' of two sovereigns by breaking the laws of each, he has committed two distinct 'offences.'" *Heath*, 474 U.S. at 88 (quoting *Lanza*, 260 U.S. at 382); *see also id.* ("[W]hen the same act transgresses the laws of two sovereigns, 'it cannot be truly averred that the offender has been twice punished for the same offence; but only that by

one act he has committed two offences, for each of which he is justly punishable.'") (quoting *Moore*, 55 U.S. (14 How.) at 19); *see also Westfall v. United States*, 274 U.S. 256, 258 (1927) (noting that the proposition that different sovereigns may punish the same conduct "is too plain to need more than statement").

Because there is no question that the States and the Federal Government are separate sovereigns, a prior state prosecution poses no federal double jeopardy bar to a subsequent federal prosecution, *see, e.g.*, *Abbate*, 359 U.S. at 189-95; *Lanza*, 260 U.S. at 382, just as a prior federal prosecution poses no federal double jeopardy bar to a subsequent state prosecution, *see, e.g.*, *Bartkus*, 359 U.S. at 128-38. Similarly, because the various States are different sovereigns, a prior prosecution by one State poses no federal double jeopardy bar to a subsequent prosecution by another State. *See, e.g.*, *Heath*, 474 U.S. at 89-93. To the limited extent the issue arose in the nineteenth century, when the scope of federal criminal law was sharply circumscribed, territories were treated as States for dual-sovereignty purposes. *See, e.g.*, *Oregon v. Coleman*, 1 Or. 191, 192 (Or. Terr. 1855) (applying dual sovereignty doctrine to reject argument that Oregon Territory could not punish sale of liquor to Indians without giving rise to double jeopardy concerns); *In re Murphy*, 40 P. 398, 399-402 (Wyo. 1895) (applying dual sovereignty doctrine to reject argument that Territory (and later State) of Wyoming could not punish bigamy without giving rise to double jeopardy concerns); *State v. Norman*, 52 P. 986, 988-89 (Utah 1898) (same); *see generally Moore*, 55 U.S. (14 How.) at 20 ("Every citizen of the United States is also a citizen of a State

or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offense or transgression of the laws of both. ... That either or both may (if they see fit) punish such an offender, cannot be doubted.") (emphasis added).

The *same* sovereign, however, may not prosecute an individual twice for the same offense. *See, e.g.*, *Benton*, 395 U.S. at 793-98. And that is true even where that sovereign delegates its power to a different entity that enacts its own laws. Thus, a State may not prosecute an individual who has already been prosecuted for the same offense by a municipality of that State; even though the State may treat the municipality as a sovereign entity under its own law, the municipality's power to punish emanates from state law. *See, e.g.*, *Waller v. Florida*, 397 U.S. 387, 391-95 (1970). Similarly, this Court held in the early twentieth century that the government of a territory (at that time, the Philippine Islands) that "owes its existence wholly to the United States," and whose courts "exert all their powers under and by authority of the same government,—that of the United States" may not prosecute an individual who has already been prosecuted for the same offense by a federal military tribunal. *Grafton*, 206 U.S. at 354-55; *cf. Shell*, 302 U.S. at 264 (federal laws and territorial laws of Puerto Rico before adoption of 1952 Constitution "are creations emanating from the same sovereignty" that would trigger federal double jeopardy protection) (dictum).

The dual sovereignty doctrine, at bottom, reflects and respects our federal system. The genius of the

Founders was to "split the atom of sovereignty," and thereby to establish "two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it." *Alden v. Maine*, 527 U.S. 706, 751 (1999) (internal quotations and brackets omitted). Because the people of the United States are subject to two governments: one state (or territorial), and the other national, "it may sometimes happen that a person is amenable to both jurisdictions for one and the same act." *United States v. Cruikshank*, 92 U.S. 542, 550 (1875). Sovereignty, in short, is not a zero-sum game, and a state or territorial government may be sovereign within its own sphere without trenching on the sovereignty of the Federal Government in a different sphere, even within the same territory. *See id.*; *see also Lara*, 541 U.S. at 212 (Kennedy, J., concurring in the judgment) ("Each sovereign must respect the proper sphere of the other, for the citizen has rights and duties as to both.").

The dual sovereignty doctrine is thus "the natural consequence of a citizenship which owes allegiance to two sovereignties, and claims protection from both." *Cruikshank*, 92 U.S. at 550-51; *see also id.* at 551 ("[The citizen] owes allegiance to the two departments, so to speak, and within their respective spheres must pay the penalties which each exacts for disobedience to its laws. In return, he can demand protection from each within its own jurisdiction."). Because the policy of a state or territorial government, on the one hand, and the Federal Government, on the other, "may be, and sometimes is, at variance on a given subject," the doctrine prevents the one from "indirectly hinder[ing] or

defeat[ing] the policy" of the other. *United States v. Barnhart*, 22 F. 285, 292 (D. Or. 1884).[2] The doctrine thus promotes the effective operation of our federal system.

C. Whether Two Entities Are Separate Sovereigns For Purposes Of The Federal Double Jeopardy Clause Depends On The Source Of Authority Of Their Laws.

The determination whether an entity is a separate sovereign for federal double jeopardy purposes does not call for a metaphysical exercise in political philosophy. Rather, it calls only for an inquiry into "the ultimate *source* of the power under which the respective prosecutions were undertaken." *Wheeler*, 435 U.S. at 320 (emphasis added); *see also Lara*, 541 U.S. at 199; *Heath*, 474 U.S. at 89-90. To the extent

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[2] As the *Barnhart* court noted well over a century ago:

> For instance, the United States, under the fifteenth amendment, may punish any one who discriminates against the exercise of the elective franchise by another on account of color. But if the state may also declare such an act a crime, it may purposefully affix a mere nominal punishment thereto, and thus give any one guilty of such an act an opportunity to seek refuge in its tribunals before the United States can reach him, and by a trial and acquittal therein, at the hands of a sympathizing jury, or the imposition of a mere nominal punishment, effectually prevent the United States from prosecuting the offender in its own courts, and inflicting such punishment upon him as may be necessary to vindicate its authority and maintain its policy in the premises.

22 F at 292.

the laws of two entities emanate from different sources of authority, successive prosecution by each entity poses no federal double jeopardy concern, regardless of the extent of control, if any, by one entity over the other.

That is the lesson of this Court's decision in *Wheeler*, which applied the dual-sovereignty doctrine to an Indian tribe. The *Wheeler* Court freely acknowledged that "Congress has *plenary authority* to legislate for the Indian tribes in all matters, including their form of government." 435 U.S. at 319 (emphasis added). But a focus on the "extent of control exercised by one prosecuting authority over the other" misses the point. *Id.* at 320. Thus, although an Indian tribe is concededly "subject to ultimate federal control," *id.* at 322, it is a separate sovereign for federal double jeopardy purposes because its authority to punish emanates from its retained sovereignty, not any power delegated by Congress, *see id.* at 322-32.

This Court subsequently applied that analysis in the context of successive criminal prosecutions by two different States. *See Heath*, 474 U.S. at 87-94. In that case, the Court reaffirmed *Wheeler*'s teaching that the dual sovereignty determination "turns on whether the two entities draw their authority to punish the offender from distinct sources of power." *Id.* at 88. Thus, "[i]n those instances where the Court has found the dual sovereignty doctrine inapplicable, it has done so because the two prosecuting entities did not derive their powers to prosecute from independent sources of authority." *Id.* at 90.

Focusing on the *source* of authority for each jurisdiction's laws, as opposed to the *extent* of authority, if any, of one jurisdiction over the other, ensures that the dual sovereignty doctrine serves its proper constitutional purpose. Insofar as the laws of two jurisdictions emanate from different sources, it cannot be said that an individual subject to successive prosecution by each jurisdiction is thereby put in jeopardy for the "same" offense. *See, e.g.*, *Heath*, 474 U.S. at 88; *Lanza*, 260 U.S. at 382; *Moore*, 55 U.S. (14 How.) at 19-21.

D. Puerto Rico Law Emanates From A Different Source Than Federal Law.

In light of the foregoing, this case boils down to the straightforward proposition that the Double Jeopardy Clause does not limit Puerto Rico's authority to prosecute a defendant previously tried, acquitted, or convicted by the Federal Government, because "its criminal laws, like those of a state, emanate from a different source than the federal laws." *United States v. López Andino*, 831 F.2d 1164, 1168 (1st Cir. 1987). That proposition may not have been true prior to the adoption of the Puerto Rico Constitution in 1952, insofar as the Puerto Rico legislature at that time exercised authority delegated by Congress through organic acts. *See, e.g.*, *Shell*, 302 U.S. at 264 (dictum); *cf. Grafton*, 206 U.S. at 353-55. But it is manifestly true after the adoption of the Puerto Rico Constitution in 1952, which represented the "constituent act of a people who ... freely determined to organize themselves into a body politic and to prescribe for themselves a basic framework of self-government," Magruder, *Commonwealth Status*, 15 U. Pitt. L. Rev. at 14, and

thus "work[ed] a significant change in the relation between Puerto Rico and the rest of the United States," *Córdova & Simonpietri Ins. Agency, Inc. v. Chase Manhattan Bank, N.A.*, 649 F.2d 36, 39 (1st Cir. 1981) (Breyer, J.); *see also U.S. Mem. to U.N.*, JA134-47.

Indeed, Congress itself could hardly have made this point any clearer. Public Law 600 of 1950, "fully recognizing the principle of government by consent," offered the people of Puerto Rico a "compact" under which they could engage in an exercise of popular sovereignty by "organiz[ing] a government pursuant to a constitution of their *own* adoption." Pub. L. No. 81-600, 64 Stat. at 319, Pet. App. 353a (codified at 48 U.S.C. § 731b; emphasis added). The only conditions were that the constitution "shall provide a republican form of government and provide a bill of rights." Pet. App. 353a (codified at 48 U.S.C. § 731c); *see also Torres*, 442 U.S. at 470 (noting that these were the "only express substantive requirements" imposed by Congress). The people of Puerto Rico accepted the compact offered by Congress, assembled a Constitutional Convention, and enacted and approved their own Constitution.

That Constitution leaves no doubt about the source of its authority. In terms redolent of both the Federal Constitution and the Declaration of Independence, the Constitution proclaims that is ordained and established by "[w]e, the people of Puerto Rico," who "create" a new political entity, the Commonwealth of Puerto Rico, "in the exercise of our natural rights." P.R. Const. pmbl., Pet. App. 358a. It confirms that "the will of the people is the source of public power." *Id.* It specifies that the

Commonwealth's "political power *emanates from the people* and shall be exercised in accordance with their will, within the terms of the compact agreed upon by the people of Puerto Rico and the United States of America." *Id.*, art. I, § 1, Pet. App. 359a (emphasis added). It creates the "legislative, judicial and executive branches" of the Commonwealth government, and provides that all three branches "shall be equally subordinate to the *sovereignty of the people of Puerto Rico.*" *Id.*, art. I, § 2, Pet. App. 359a (emphasis added). It vests "[t]he executive power" of the Commonwealth "in a Governor," *id.* art. IV, § 1, Pet. App. 360a, "[t]he legislative power" of the Commonwealth "in a Legislative Assembly," *id.*, art. III, § 1, Pet. App. 360a, and "[t]he judicial power" of the Commonwealth in "a Supreme Court, and in such other courts as may be established by law," *id.*, art. V, § 1, Pet. App. 361a. And it provides that "[a]ll criminal actions in the courts of the Commonwealth shall be conducted in the name and *by the authority of* the 'People of Puerto Rico.'" *Id.*, art. VI, § 18, Pet. App. 362a (emphasis added).

Neither Congress nor the President plays any role whatsoever in the enactment or enforcement of the laws of Puerto Rico. *See U.S. Mem. to U.N.*, JA141-44. Those laws are not submitted to Congress for review, and there is no legal mechanism for Congress to block them or otherwise interfere with the Commonwealth's internal governance (and Congress has never attempted to do so). Nor does the President have any power to select or remove any of the persons who enforce the laws of Puerto Rico, thereby underscoring that such persons cannot possibly be deemed to be exercising delegated federal power. *See, e.g.*, *Lara*, 541 U.S. at 216 (Thomas, J.,

concurring in the judgment); *U.S. Mem. to U.N.*, JA141-42. The power to enforce the criminal laws, after all, is the quintessential executive power, so Puerto Rico prosecutors could not exercise delegated federal power while being wholly beyond any form of "meaningful Presidential control." *Printz v. United States*, 521 U.S. 898, 922 (1997); *see also Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 492-98 (2010); *Metropolitan Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 265-71 (1991); *Morrison v. Olson*, 487 U.S. 654, 692-93, 695-96 (1988).[3]

Pursuant to Public Law 600, the Puerto Rico Constitution was duly submitted to the President, who in turn submitted it to Congress for its approval. App. 355-56a. Congress considered the proposed Constitution, and approved it conditioned on minor revisions to provisions addressing compulsory school attendance and the process for constitutional amendments as well as the elimination of section 20 recognizing a number of then-novel human rights. *See* Pub. L. No. 82-447, 66 Stat. 327, Pet. App. 356-57a. By approving the Constitution, Congress necessarily recognized that—as the Constitution makes clear on its face—the people of Puerto Rico had exercised their *own* sovereignty to establish their *own* government to enact their *own* laws.

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[3] *Grafton* and *Kepner*, in contrast, involved prosecutions brought by the civilian government in the Philippine Islands led by a Governor appointed (and removable) by the President. *See* Act of July 1, 1902, Ch. 1369, 57th Cong., 1st Sess., § 1, 32 Stat. 691, 692 (1902); *see also Grafton*, 206 U.S. at 342-45; *Kepner*, 195 U.S. at 110.

Indeed, Public Law 600 specifies that the Puerto Rico Constitution "shall provide a republican form of government." Pet. App. 353a (codified at 48 U.S.C. § 731c). As this Court has long explained, "the distinguishing feature of that form is the right of the people to choose their *own* officers for governmental administration, and pass their *own* laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of *the people themselves*." *Duncan v. McCall*, 139 U.S. 449, 461 (1891) (emphasis added); *see also id.* (in a republican form of government, "the people are ... the source of political power"). Before forwarding the Puerto Rico Constitution to Congress, the President was required to ensure that it complied with that provision, *see* Pet. App. 353a (codified at 48 U.S.C. § 731d), and duly did so, *see Public Papers of the Presidents, Harry S. Truman 1952-53*, at 287, 471; Pet. App. 355a. Congress too independently satisfied itself that the Puerto Rico Constitution provided a republican form of government. *See* Pet. App. 356a. Congress hardly would have insisted that Puerto Rico adopt a "republican form of government," and the President and Congress hardly would have confirmed that Puerto Rico had in fact done so, if that government exercised authority delegated by Congress, as opposed to the people of Puerto Rico.

The fact that Congress authorized the exercise of popular sovereignty that led to the adoption of the Puerto Rico Constitution in the first place does not render it any less an exercise of popular sovereignty. After all, most of the thirty-seven States that entered the Union after the original thirteen States started out as United States territories. In no fewer than twenty-one of those territories, Congress similarly

authorized the exercise of popular sovereignty that led to the adoption of a state constitution and eventual admission to the Union. *See infra* Appendix A. But such authorization did not transform these state constitutions into federal law—even where Congress imposed certain conditions on the prospective constitutions (such as a ban on polygamy or a guarantee of non-sectarian public education). *See* Pub. L. No. 61-219, 36 Stat. 557, 558-59, 569-70 (1910) (New Mexico and Arizona); Pub. L. No. 59-233, 34 Stat. 267, 269-71 (1906) (Oklahoma); Ch. 138, 53rd Cong., 2d Sess., 28 Stat. 107, 108 (1894) (Utah); *see generally* Eric Biber, *The Price of Admission: Causes, Effects & Patterns of Conditions Imposed on States Entering the Union*, 46 Am. J. Legal Hist. 119, 200-08 (2004).

As this Court has explained, moreover, Congress can recognize and confirm an exercise of sovereignty by another entity without thereby delegating federal power. *See Lara*, 541 U.S. at 203-04. In that case, Congress recognized and confirmed the sovereignty of an Indian tribe to apply its criminal laws to an Indian who was not a member of the tribe, *see* 25 U.S.C. § 1301(2), even though this Court had previously held that the tribe had no such sovereignty, *see Duro v. Reina*, 495 U.S. 676, 689-92 (1990). The Court held that this was a valid exercise of congressional power that rendered the tribe a separate sovereign for federal double jeopardy purposes. *See Lara*, 541 U.S. at 199-207. The Court justified that holding in part by noting that Congress had also "made adjustments to the autonomous status of other such dependent entities—sometimes making far more radical adjustments than those at issue here." *Id.* at 203. In support of that point, the

Court cited, among other examples, Public Law 600 and the Puerto Rico Constitution. *See id.* at 204. Needless to say, that citation would be inexplicable if Public Law 600 and the Puerto Rico Constitution reflected nothing more than a delegation of federal power.

Nor does the fact that Congress reviewed the proposed Puerto Rico Constitution, and conditioned its approval thereof on certain changes, in any way negate the exercise of popular sovereignty that led to the adoption of that Constitution in the first place. Virtually every State after the original thirteen submitted its proposed constitution to either Congress or the President for approval as a condition for admission to the Union. *See infra* Appendix B. The fact that Congress or the President reviewed and approved these state constitutions, of course, did not transform them into federal law.

And that is true even where, as in several instances, Congress conditioned its approval of those constitutions on certain changes. *See generally* Biber, *The Price of Admission*, 46 Am. J. Legal Hist. at 200-08. Thus, for example, Congress conditioned its approval of the Nebraska Constitution on the elimination of a provision that "deni[ed] the elective franchise" on the basis of "race or color," Nebraska Admissions Act, Ch. 36, 39th Cong., 2d Sess., 14 Stat. 391, 392 (1867), and conditioned its approval of the Missouri Constitution on the disavowal of a potentially problematic reading of a certain constitutional provision, *see* Resolution Providing for the Admission of the State of Missouri into the Union on a Certain Condition, Ch. 53, 16th Cong., 2d Sess., 3 Stat. 645, 645 (1821). Similarly, as a condition for

approving the proposed constitutions of New Mexico and Arizona, Congress required the adoption of lengthy constitutional amendments *drafted by Congress itself* concerning recall elections and constitutional amendments. *See* Pub. L. No. 62-8, 37 Stat. 39, 40-41, 42-43 (1911). Again, it would be fanciful to suggest that such conditional approval transformed these state constitutions into federal law.

Indeed, when conditionally approving the Puerto Rico Constitution, Congress did not simply impose the changes it desired. Instead, it specified that the proposed Constitution must be "amended by *the people of Puerto Rico*." Pet. App. 356-57a (emphasis added). Congress further provided that "the Constitution of the Commonwealth of Puerto Rico hereby approved shall become effective when the Constitutional Convention of Puerto Rico shall have declared in a formal resolution its acceptance *in the name of the people of Puerto Rico* of the conditions of approval herein contained," and when the Governor of Puerto Rico shall issue a proclamation to that effect. Pub. L. No. 82-447, 66 Stat. at 327-28, Pet. App. 357a (emphasis added). Without this final sovereign act of acceptance by the people of Puerto Rico, in other words, the Puerto Rico Constitution never would have taken effect.

Post-1952 decisions of this Court involving Puerto Rico only confirm that the Commonwealth's laws emanate from sovereign authority delegated by the people of Puerto Rico, not from Congress. In 1974, this Court held that the Commonwealth's laws are "State statute[s]" within the meaning of the Three-Judge Court Act, 28 U.S.C. § 2281. *See Calero-*

Toledo, 416 U.S. at 670-73. The Court based that holding on the "significant changes in Puerto Rico's governmental structure" resulting from the establishment of the Commonwealth by the 1952 Constitution. *Id.* at 672. As the Court explained, the Commonwealth was "'organized as a body politic *by the people of Puerto Rico* under their *own* constitution.'" *Id.* (emphasis added; quoting *Mora v. Mejías*, 206 F.2d 377, 387 (1st Cir. 1953)). Precisely because the Commonwealth's laws reflect the sovereign will of the people of Puerto Rico, they are due the solicitude given to "[S]tate statutes" under the Three-Judge Court Act "to avoid unnecessary interference with the laws of a sovereign state." *Id.* at 670, 675 (internal quotation omitted). The laws of the Commonwealth of Puerto Rico, the Court held, thus differ from the laws of a territory "'subject to congressional regulation.'" *Id.* at 673 (quoting and distinguishing *Stainback v. Mo Hock Ke Lo Po*, 336 U.S. 368 (1949), which held that the Three-Judge Court Act did not apply to laws enacted by the Territory of Hawaii). The Court thereby abrogated *Benedicto v. West India & Panama Tel. Co.*, 256 F. 417, 419 (1st Cir. 1919), which predated the establishment of the Commonwealth.

The Court built upon *Calero-Toledo* two years later in *Flores de Otero*. The issue there was whether a federal statute giving federal district courts jurisdiction over actions "to redress the deprivation, under color of any *State* law ... of any right, privilege or immunity" secured by federal law, applied to actions challenging laws of the Commonwealth of Puerto Rico. 426 U.S. at 574-75 & n.1 (emphasis added). In answering that question in the affirmative, the Court emphasized that Public

Law 600 had authorized the people of Puerto Rico "to draft their *own* constitution," and that, in light of that Constitution, "Puerto Rico now elects its Governor and legislature; appoints its judges, all cabinet officials, and lesser officials in the executive branch; ... and amends its *own* civil and criminal code." 426 U.S. at 593, 594 (emphasis added; internal quotation omitted); *see also id.* at 597 ("[A]fter 1952, ... Congress relinquished its control over the organization of the local affairs of the island and granted Puerto Rico a measure of autonomy comparable to that possessed by the States.").

And in 1982, this Court upheld "[t]he methods by which the people of Puerto Rico and their representatives have chosen to structure the Commonwealth's electoral system" against a federal constitutional challenge. *Rodríguez*, 457 U.S. at 8. In so ruling, this Court held that those methods are entitled to "substantial deference" precisely because "Puerto Rico, like a state, is an autonomous political entity, '*sovereign* over matters not ruled by the [federal] Constitution.'" *Id.* (emphasis added; quoting *Calero-Toledo*, 416 U.S. at 673, and citing *Córdova*, 649 F.2d at 39-42).

In the final analysis, as the First Circuit observed more than half a century ago, to characterize the Constitution and laws of the Commonwealth of Puerto Rico as delegated federal law is "to impute to the Congress the perpetration of ... a monumental hoax." *Figueroa*, 232 F.2d at 620. Since 1952, the Federal Government has told the people of Puerto Rico and the world that the people of Puerto Rico democratically adopted and approved their *own* Constitution. *See, e.g., U.S. Mem. to U.N.*, JA134-47.

That Constitution, which Congress reviewed and approved, establishes a government of the people, by the people, and for the people of Puerto Rico. In this regard, the Constitution of Puerto Rico is no different than the constitutions of the fifty States; the latter simply led to Statehood, whereas the former led instead to the affiliated status of a Commonwealth (*Estado Libre Asociado*, or literally "Free Associated State"). While Puerto Rico thus "occupies a relationship to the United States that has no parallel in our history," *Flores de Otero*, 426 U.S. at 596,[4] the

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[4] Prior to the adoption of the Puerto Rico Constitution in 1952, no other territory of the United States had ever adopted its own constitution without proceeding to apply for statehood. In 1976, the Northern Mariana Islands and the United States entered into a Covenant to establish a Commonwealth, *see* Pub. L. No. 94-241, 90 Stat. 263 (1976), codified at 48 U.S.C. § 1801 *et seq.*, and the people of the Northern Mariana Islands thereafter adopted their own Constitution that was subsequently approved by the President, *see* Proclamation No. 4534, 42 Fed. Reg. 56593 (Oct. 24, 1977). No court has squarely addressed the double jeopardy implications of that arrangement; the District Court of the Northern Mariana Islands has opined in *dicta* that the Commonwealth of the Northern Mariana Islands and the Federal Government are separate sovereigns for federal double jeopardy purposes. *See United States ex rel. Richards v. De Leon Guerrero*, No. 92-1, 1992 WL 321010, at *35 (D. N. Mar. I. July 24, 1992), *aff'd on other grounds*, 4 F.3d 749 (9th Cir. 1993). The District of Columbia, Guam, the Virgin Islands, and American Samoa are all self-governed pursuant to organic acts of Congress, although American Samoa has adopted a constitution under the auspices of the Department of the Interior. *See* Pub. L. No. 93-198, 87 Stat. 774 (1973), codified at D.C. Code § 1-201.01 *et seq.* (District of Columbia); Pub. L. No. 81-630, 64 Stat. 384 (1950), codified at 48 U.S.C. § 1421 *et seq.* (Guam); Pub. L. No. 83-517, 68 Stat. 497 (1954), codified at 48 U.S.C. § 1391 *et seq.* (Virgin Islands); Pub. L. No.

fact that its Constitution led to association by compact instead of statehood does not negate the exercise of popular sovereignty that established that Constitution in the first place. In light of that Constitution, the laws of Puerto Rico emanate from the people of Puerto Rico, just as the laws of the fifty States emanate from the people of those States, and Puerto Rico, like a State, qualifies as a separate sovereign for federal double jeopardy purposes.

E. The Extent Of Congress' Authority Over Puerto Rico Under The Territorial Clause Is Irrelevant To The Federal Double Jeopardy Inquiry.

The Puerto Rico Supreme Court based its contrary conclusion on the proposition that, "with the adoption of a constitution, Puerto Rico did not cease to be a territory of the United States subject to the powers of Congress, as provided in the territorial clause of the federal Constitution (Art. IV, § 3)." Pet. App. 65a; *see also United States v. Sánchez*, 992 F.2d 1143, 1150-53 (11th Cir. 1993). But that is a legal and logical *non sequitur*. The extent of Congress' authority over Puerto Rico under the Territorial

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70-89, 45 Stat. 1253 (1929), codified at 48 U.S.C. § 1661 *et seq.*; Exec. Order No. 10,264, 16 Fed. Reg. 6417 (June 29, 1951) (American Samoa). The lower courts have held that these entities and the Federal Government are a single sovereign for federal double jeopardy purposes, *see, e.g., United States v. Weathers*, 186 F.3d 948, 951 n.3 (D.C. Cir. 1990) (citing cases); *United States v. Carriaga*, 117 F.3d 1426 (9th Cir. 1997) (*per curiam*); *Government of the Virgin Islands v. Dowling*, 633 F.2d 660, 669 (3d Cir. 1980), and indeed a federal statute provides as much with respect to Guam, the Virgin Islands, and American Samoa, *see* 48 U.S.C. § 1704.

Clause has no bearing on the dispositive issue here—"the *source* of th[e] power to punish" violations of Puerto Rico law. *Wheeler*, 435 U.S. at 322 (emphasis added); *see also Lara*, 541 U.S. at 199; *Heath*, 474 U.S. at 88-89.

The Puerto Rico Supreme Court below, like the Eleventh Circuit in *Sánchez*, appears to have fallen into a semantic trap. Because the relevant doctrine is called the dual *sovereignty* doctrine, those courts concluded that Puerto Rico could not invoke that doctrine unless it could claim to be a "sovereign" for all purposes, and that it could not make such a claim insofar as it remained subject to federal authority under the Territorial Clause. *See* Pet. App. 66a ("The Commonwealth of Puerto Rico is not a sovereign entity inasmuch as, being a territory, its ultimate source of power to prosecute offenses is derived from the United States Congress.") (emphasis omitted); *Sánchez*, 992 F.2d at 1151 ("Puerto Rico is still constitutionally a territory, and not a separate sovereign.").

That approach cannot be squared with this Court's dual sovereignty jurisprudence. As noted above, it is an "undisputed fact that Congress has *plenary* authority to legislate for the Indian tribes in all matters, including their form of government." *Wheeler*, 435 U.S. at 319 (emphasis added). Nonetheless, those tribes are deemed separate sovereigns for federal double jeopardy purposes because their laws do not emanate from authority delegated by Congress. *Id.* at 329-30; *see also Lara*, 541 U.S. at 203. What matters is "not the extent of control exercised by one prosecuting authority over the other but rather the ultimate source of the power

under which the respective prosecutions were undertaken." 435 U.S. at 320; *see also Heath*, 474 U.S. at 88 (dual sovereignty determination "turns on whether the two entities draw their authority to punish the offender from distinct sources of power").

It follows that the Territorial Clause has no bearing here, and this Court's summary decision in *Harris v. Rosario*, 446 U.S. 651, 651-52 (1980) (*per curiam*), which holds that Congress may treat Puerto Rico differently than a State under the Territorial Clause, is inapposite. That case involved the scope of Congress' power under the *Federal* Constitution to apply federal law selectively to Puerto Rico, not the source of Puerto Rico's power under the *Commonwealth* Constitution to enact its own laws. This case, of course, has nothing to do with the extent of Congress' authority to apply *federal* law to Puerto Rico, but instead Puerto Rico's authority to enforce its *own* criminal laws enacted under its *own* Constitution.

The Puerto Rico Supreme Court also missed the point by focusing on what it characterized as Congress' unfettered "constitutional authority to amend or revoke the powers exercised by the Government of Puerto Rico." Pet. App. 61a; *see also Sánchez*, 992 F.2d at 1150 ("Every exercise of authority in a territory which does not proceed under a direct Congressional enactment proceeds, at least, at the sufferance of the Congress, which may override disfavored rules or institutions at will.").

As an initial matter, there is no reason to suppose that Congress "may unilaterally repeal the Puerto Rican Constitution," *id.* at 1152, or revoke the "compact" offered by Public Law 600 and accepted by

the people of Puerto Rico. *See Flores de Otero*, 426 U.S. at 597 (noting that Congress in 1952 "*relinquished* its control over the organization of the local affairs of the island") (emphasis added); *United States v. Quiñones*, 758 F.2d 40, 42 (1st Cir. 1985) ("[I]n 1952, Puerto Rico ceased being a territory of the United States subject to the plenary powers of Congress as provided in the Federal Constitution. The authority exercised by the federal government emanated thereafter from the compact itself.");[5] *see generally* Magruder, *Commonwealth Status*, 15 U. Pitt. L. Rev. at 13-15 (concluding that the question whether Congress can unilaterally revoke

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[5] The general rule that one Congress cannot bind a later one, after all, is not absolute. *See, e.g., Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 135 (1810) (Marshall, C.J.) ("The past cannot be recalled by the most absolute power."); *Perry v. United States*, 294 U.S. 330, 353 (1935) ("[T]he right to make binding obligations is a competence attaching to sovereignty."). Congress' power over the territories necessarily includes the power to relinquish such power, either in whole or in part. Thus, just as one Congress could commit the United States to granting independence to the Philippine Islands, *see* Pub. L. No. 73-127, 48 Stat. 456 (1934), one Congress could commit the United States to a "compact" with the people of Puerto Rico that a subsequent Congress could not unilaterally abrogate, Pub. L. No. 81-600, 64 Stat. 319, Pet. App. 353a; *cf. Downes*, 182 U.S. at 269-71 (once Congress incorporates a territory into the United States, Congress cannot subsequently limit the operation of the Constitution there); *id.* at 261 ("There are steps which can never be taken backward."); *Springville v. Thomas*, 166 U.S. 707, 708-09 (1897) (same). Indeed, the statutory reference to a "compact with the people of Puerto Rico," Pub. L. No. 82-447, 66 Stat. 327, Pet. App. 355a, would be inexplicable if Congress retained unilateral authority to revoke the Puerto Rico Constitution.

the compact with Puerto Rico is ultimately academic because, as a "practical" matter, Congress cannot unilaterally revoke the Puerto Rico Constitution and "pass a new Organic Act for the internal government of Puerto Rico").

But putting aside the fact that Congress in 1952 "relinquished its control over the organization of the local affairs of the island," *Flores de Otero*, 426 U.S. at 597, the existence of any such control would not alter the double jeopardy analysis. The sovereignty of the Indian tribes, after all, "exists only at the sufferance of Congress and is subject to complete defeasance," *Wheeler*, 435 U.S. at 322, but that does not negate their status as separate sovereigns for federal double jeopardy purposes when enforcing their own laws. "*[U]ntil Congress acts*, the tribes retain their existing sovereign powers." *Id.* (emphasis added). Here too, there can be no question that Congress has not in fact interfered with or supplanted the criminal laws of the Commonwealth of Puerto Rico. It follows that successive prosecution under those laws and federal laws poses no federal double jeopardy concerns.

Nor is it possible to distinguish the Indian cases cited above, as both the Puerto Rico Supreme Court and the Eleventh Circuit sought to do, on the ground that the tribes have an "inherent" or "original" sovereignty that predates the formation of the United States. *See* Pet. App. 65a; *Sánchez*, 992 F.2d at 1152-53 & n.11. The point of those cases is that tribal laws emanate from the tribes' own sovereign authority, not authority delegated by Congress. *See, e.g.*, *Lara*, 541 U.S. at 199-207; *Wheeler*, 435 U.S. at

322-32. Similarly here, Puerto Rico law emanates from the people of Puerto Rico, not from Congress.

In this regard, once again, Puerto Rico is in the same position as most of the States that entered the Union after the ratification of the Federal Constitution. None of those States (with the possible exception of Texas and Hawaii) could claim an "inherent" or "original" sovereignty predating its association with the United States. *See Lara*, 541 U.S. at 210-11 (Stevens, J., concurring) ("[M]ost of the States were never actually independent sovereigns, and those that were enjoyed that independent status for only a few years."). Rather, most of those States started out as territories established by the Federal Government that eventually developed, engaged in an exercise of popular sovereignty by enacting their own constitutions, and sought admission to the Union. *See infra* Appendix C (citing territorial acts establishing territories that eventually petitioned for Statehood). The sovereignty of each of those States, like the sovereignty of Puerto Rico (and indeed the United States itself) thus emanates from its own people, and forms the basis for its own government and laws.[6]

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[6] The Eleventh Circuit in *Sánchez* engaged in some revisionist history to avoid this straightforward point. The court acknowledged, as it must, that "[a]fter the creation of the Union from the original thirteen states, new states have been admitted to the Union from what had theretofore been territories of the United States." 992 F.2d at 1149 n.4. The court could not explain, however, how those territories obtained their sovereignty. Thus, the court simply created its own history, asserting that "[a]lthough the process may never have

* * *

At bottom, this is a straightforward case. The Double Jeopardy Clause of the United States Constitution poses no barrier to successive prosecution under Puerto Rico and federal law, because those laws emanate from different sources of authority. To conclude, as did the Puerto Rico Supreme Court, that the Commonwealth's laws emanate from authority delegated by Congress is to disparage the dignity of the people of Puerto Rico who established the Commonwealth and its Constitution in 1952.

To be sure, there is a lively debate in Puerto Rico with respect to the island's political status. But even those who advocate a change in that status cannot deny that "[w]e, the people of Puerto Rico," created the Commonwealth and its laws. P.R. Const. pmbl., Pet. App. 358a. Puerto Rico is thus a separate sovereign for federal double jeopardy purposes. That conclusion does not negate federal sovereignty in Puerto Rico. Just as there is no inconsistency in recognizing federal sovereignty in California while also recognizing California sovereignty, there is no inconsistency in recognizing federal sovereignty in Puerto Rico while also recognizing Puerto Rico

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been formally acknowledged, Congress must have, at some instant, relinquished its authority over territorial lands so that the people of those lands could approach the United States as an independent entity seeking admission to the Union." *Id.* That assertion is baseless. No magic fairy descended upon those territories before their admission to the Union to tap them with a wand of sovereignty. Rather, the citizens of these territories simply engaged in an exercise of popular sovereignty by enacting their own constitutions.

sovereignty. Both flags can, and do, fly together side by side on the island.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment.

Respectfully submitted,

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APPENDICES

APPENDIX A

Congressional Acts Authorizing Territorial Governments To Propose State Constitutions

Alabama:

Ch. 47, 15th Cong., 2d Sess., 3 Stat. 489 (1819) ("[T]he inhabitants of the territory of Alabama be, and they are hereby, authorized to form for themselves a constitution and state government, and to assume such name as they may deem proper.")

Arizona:

Pub. L. No. 61-219, 36 Stat. 557 (1910) ("[T]he qualified electors of the Territory of Arizona are hereby authorized to vote for and choose delegates to form a constitutional convention for said Territory for the purpose of framing a constitution for the proposed State of Arizona.")

Colorado:

Ch. 139, 43rd Cong., 2d Sess., 18 Stat. 474 (1875) ("[T]he members of the convention thus elected shall meet at the capital of said Territory ... and, after organization, shall declare, on behalf of the people of said Territory, that they adopt the Constitution of the United States, whereupon the said convention shall be, and is hereby, authorized to form a constitution and State government for said Territory.")

Illinois:

Ch. 67, 15th Cong., 1st Sess., 3 Stat. 428 (1818) ("[T]he inhabitants of the territory of Illinois be, and they are hereby, authorized to form for themselves a constitution and state government,

and to assume such name as they shall deem proper.")

Indiana:

Ch. 57, 14th Cong., 1st Sess., 3 Stat. 289 (1816) ("[T]he inhabitants of the territory of Indiana be, and they are hereby authorized to form for themselves a constitution and state government, and to assume such name as they shall deem proper.")

Louisiana:

Ch. 21, 11th Cong., 3d Sess., 2 Stat. 641 (1811) ("[T]he inhabitants of all that part of the territory or country ceded under the name of Louisiana, ... contained within the following limits ... be and they are hereby authorized to form for themselves a constitution and state government, and to assume such name as they may deem proper, under the provisions and upon the conditions herein after mentioned.")

Minnesota:

Ch. 60, 34th Cong., 3d Sess., 11 Stat. 166 (1857) ("[T]he inhabitants of that portion of the Territory of Minnesota which is embraced within the following limits ... be and they are hereby authorized to form for themselves a Constitution and State Government, by the name of the State of Minnesota.")

Mississippi:

Ch. 23, 14th Cong., 2d Sess., 3 Stat. 348 (1817) ("That the inhabitants of the western part of the Mississippi territory ... be, and they hereby are, authorized to form for themselves a constitution

and state government, and to assume such name as they shall deem proper.")

Missouri:

Ch. 22, 16th Cong., 1st Sess., 3 Stat. 545 (1820) ("[T]he inhabitants of that portion of the Missouri territory included within the boundaries hereinafter designated, be, and they are hereby, authorized to form for themselves a constitution and state government, and to assume such name as they shall deem proper.")

Montana:

Ch. 180, 50th Cong., 2d Sess., 25 Stat. 676 (1889) ("[T]he delegates to the conventions elected as provided for in this act shall meet at the seat of government of each of said Territories ... and, after organization, shall declare, on behalf of the people of said proposed States, that they adopt the Constitution of the United States; whereupon the said conventions shall be, and are hereby, authorized to form constitutions and States governments for said proposed States, respectively.")

Nebraska:

Ch. 59, 38th Cong., 1st Sess., 13 Stat. 47 (1864) ("[The inhabitants of that portion of the territory of Nebraska included in the boundaries hereinafter designated be, and they are hereby, authorized to form for themselves a constitution and state government.")

Nevada:

Ch. 36, 38th Cong., 1st Sess., 13 Stat. 30 (1864) ("[T]he members of the convention, thus elected,

shall meet at the capital of said territory ... and, after organization, shall declare, on behalf of the people of said territory, that they adopt the constitution of the United States. Whereupon the said convention shall be, and it is hereby, authorized to form a constitution and state government for said territory.")

New Mexico:

Pub. L. No. 61-219, 36 Stat. 557 (1910) ("[T]he qualified electors of the Territory of New Mexico are hereby authorized to vote for and choose delegates to form a constitutional convention for said Territory for the purpose of framing a constitution for the proposed State of New Mexico.")

North Dakota:

Ch. 180, 50th Cong., 2d Sess., 25 Stat. 676 (1889) ("[T]he delegates to the conventions elected as provided for this act shall meet at the seat of government of each of said Territories ... and, after organization, shall declare, on behalf of the people of said proposed States, that they adopt the Constitution of the United States; whereupon the said conventions shall be, and are hereby, authorized to form constitutions and States governments for said proposed States, respectively.")

Ohio:

Ch. 40, 7th Cong., 1st Sess., 2 Stat. 173 (1802) ("[T]he inhabitants of the eastern division of the territory northwest of the river Ohio, be, and they are thereby authorized to form for themselves a constitution and state government.")

Oklahoma:

Pub. L. No. 59-234, 34 Stat. 267 (1906) ("[T]he inhabitants of all that part of the United States now constituting the Territory of Oklahoma and the Indian Territory, as at present described, may adopt a constitution and become the State of Oklahoma, as hereinafter provided.")

South Dakota:

Ch. 180, 50th Cong., 2d Sess., 25 Stat. 676 (1889) ("[T]he delegates to the conventions elected as provided for this act shall meet at the seat of government of each of said Territories ... and, after organization, shall declare, on behalf of the people of said proposed States, that they adopt the Constitution of the United States; whereupon the said conventions shall be, and are hereby, authorized to form constitutions and States governments for said proposed States, respectively.")

Texas:

Res. 8, 28th Cong., 2d Sess., 5 Stat. 797 (1845) ("Congress doth consent that the territory properly included within, and rightfully belonging to the Republic of Texas, may be erected into a new State, to be called the State of Texas, with a republican form of government, to be adopted by the people of said republic, by deputies in convention assembled.")

Utah:

Ch. 138, 53rd Cong., 2d Sess., 28 Stat. 107 (1894) ("That the delegates to the convention thus elected shall meet at the seat of government of said Territory ... and, after organization, shall declare

on behalf of the people of said proposed State that they adopt the Constitution of the United States, whereupon the said convention shall be, and is hereby, authorized to form a constitution and State government for said proposed State.")

Washington:

Ch. 180, 50th Cong., 2d Sess., 25 Stat. 676 (1889) ("That the delegates to the conventions elected as provided for in this act shall meet at the seat of government of each of said Territories on behalf of the people of said proposed States, that they adopt the Constitution of the United States; whereupon the said conventions shall be, and are hereby, authorized to form constitutions and States governments for said proposed States, respectively.")

Wisconsin:

Ch. 89, 29th Cong., 1st Sess., 9 Stat. 56 (1846) ("[T]he people of the Territory of Wisconsin be, and they are hereby, authorized to form a constitution and State government.")

APPENDIX B

Congressional Acts And Presidential Proclamations Approving Proposed State Constitutions

Alabama:

Res. 1, 16th Cong., 1st Sess., 3 Stat. 608 (1820) ("Whereas ... the people of the said territory did, on the second day of August, in the present year, by a convention called for that purpose, form for themselves a constitution and state government, which constitution and state government so formed, is republican, and in conformity to the principles of the articles of compact between the original states ... [T]he state of Alabama shall be one, and is hereby declared to be one, of the United States of America.")

Alaska:

Pub. L. 85-508, 72 Stat. 339 (1958) (Subject to the provisions of this Act, and upon issuance of the proclamation required by section 8 (c) of this Act, ... the constitution formed pursuant to the provisions of the Act of the Territorial Legislature of Alaska ... is hereby found to be republican in form and in conformity with the Constitution of the United States and the principles of the Declaration of Independence, and is hereby accepted, ratified, and confirmed.")

48 U.S.C. § 21 note ("WHEREAS I find and announce that the people of Alaska have duly adopted the propositions required to be submitted to them ... I, Dwight D. Eisenhower, ... declare and proclaim that the procedural requirements imposed by the Congress on the State of Alaska to

entitle that State to admission into the Union on an equal footing with the other States of the Union is now accomplished.")

Arizona:

Pub. Res. 62-8, 37 Stat. 39 (1911) ("The Territories of New Mexico and Arizona are hereby admitted into the Union upon an equal footing with the original State[] ... upon the terms and conditions hereinafter set forth. The admission herein provided for shall take effect upon the proclamation of the President of the United States, when the conditions explicitly set forth in this joint resolution shall have been complied with.")

62 Proclamation, 37 Stat. 1728 (1912) ("Whereas the Congress of the United States did pass a joint resolution, ... which resolution required that, as a condition precedent to the admission of said State, the electors of Arizona should, at the time of the holding of the State election as recited in said resolution, vote upon and ratify and adopt an amendment was proposed and set forth at length in said resolution of Congress ... I, WILLIAM HOWARD TAFT, ... declare and proclaim the fact that the fundamental conditions imposed by Congress on the State of Arizona to entitle that State to admission have been ratified and accepted, and that the admission of the State is now complete.")

Arkansas:

Ch. 100, 24th Cong., 1st Sess., 5 Stat. 50 (1836) ("[T]he people of the Territory of Arkansas, did, ... form for themselves a constitution and State

Government, which constitution and State Government, so formed in republican.")

California:

Ch. 50, 31st Cong., 1st Sess., 9 Stat. 452 (1850) ("[T]he people of California have presented a constitution and asked admission into the Union ... which, on due examination, is found to be republican in its form of government.")

Colorado:

1876 Pres. Proc. No. 6, 19 Stat. 665 (1876) ("I, ULYSSES S. GRANT, ... declare and proclaim the fact that the fundamental conditions imposed by Congress on the State of Colorado to entitle that State to admission to the Union have been ratified and accepted ...")

Florida:

Ch. 48, 28th Cong., 2d Sess., 5 Stat. 742 (1845) ("Whereas, the people of the Territory of Iowa did ... form for themselves a constitution and State government; and whereas, the people of Territory of Florida did, in like manner, ... form for themselves a constitution and State government, both of which said constitutions are republican ...")

Hawaii:

Pub. L. 86-3, 73 Stat. 4 (1959) ("[S]ubject to the provisions of this Act, and upon issuance of the proclamation required by section 7(c) of this Act, ... the constitution formed pursuant to the provisions of the Act of the Territorial Legislature of Hawaii ... is hereby found to be republican in form and in conformity with the Constitution of

the United States and the principles of the Declaration of Independence, and is hereby accepted, ratified, and confirmed.")

Pres. Proc. No. 3309, 73 Stat. c74 (1959)
(I, DWIGHT D. EISENHOWER, ... hereby declare and proclaim that the procedural requirements imposed by the Congress on the State of Hawaii to entitle that State to admission into the Union have been complied with in all respects ...")

Idaho:

Ch. 656, 51st Cong., 1st Sess., 26 Stat. 215 (1890) ("The people of the Territory of Idaho did[] ... form for themselves a constitution, ... which constitution is republican in form and is in conformity with the Constitution of the United States.")

Illinois:

Res. 1, 15th Cong., 2d Sess., 3 Stat. 536 (1818) ("[I]n pursuance of an act of Congress, ... the people of said territory did, on the twenty-sixth day of August, in the present year, by a convention called for that purpose, form for themselves a constitution and state government, which constitution and state government, so formed, is republican, and in conformity to the principles of the articles of compact between the original states and the people and states in the territory north-west of the river Ohio ...")

Indiana:

Res. 1, 14th Cong., 2d Sess., 3 Stat. 399 (1816) ("[I]n pursuance of an act of Congress, ... the people of the said territory did, on the twenty-ninth day of June, in the present year, by a

convention called for that purpose, form for themselves a constitution and state government, so formed, is republican, and in conformity with the principles of the articles of compact between the original states and the people and states in the territory north-west of the river Ohio ...)

Iowa:

Ch. 48, 28th Cong., 2d Sess., 5 Stat. 742 (1845) ("Whereas, the people of the Territory of Iowa did ... form for themselves a constitution and State government; and whereas, the people of Territory of Florida did, in like manner, ... form for themselves a constitution and State government, both of which said constitutions are republican ...")

Ch. 1, 29th Cong., 2d Sess., 9 Stat. 117 (1846) ("[T]he people of the Territory of Iowa did[] ... form for themselves a constitution and State government—which constitution is republican in its character and features—and said convention has asked admission of the said Territory into the Union as a State ...")

Kansas:

Ch. 26, 35th Cong., 1st Sess., 11 Stat. 269 (1858) ("Whereas, the people of the Territory of Kansas did[] ... form for themselves a constitution and State government, which constitution is republican; ... [and] said convention did adopt an ordinance ... and *whereas* said ordinance is not acceptable to Congress, and it is desirable to ascertain whether the people of Kansas concur in the changes in said ordinance, hereinafter stated,

and desire admission into the Union as a State as herein proposed.")

Ch. 20, 36th Cong., 2d Sess., 12 stat. 126 (1861) ("[T]he people of the Territory of Kansas[]... did form for themselves a constitution and State government, republican in form, which was ratified and adopted by the people ...")

Louisiana:

Ch. 50, 12th Cong., 1st Sess., 2 Stat. 701 (1812) ("[T]he representatives of the people of all that part of the territory or country ceded, under the name of "Louisiana," by the treaty made at Paris, ... between the United States and France, contained within the following limits ... [did] form for themselves a constitution and state government, and give to the said state the name of the state of Louisiana in pursuance of an act of Congress ... And the said constitution having been transmitted to Congress and by them being hereby approved.")

Michigan:

Ch. 99, 24th Cong., 1st Sess., 5 Stat. 49 (1836) ("[T]he constitution and State Government which the people of Michigan have formed for themselves be, the same is hereby, accepted, ratified, and confirmed ... *Provided always*, and this admission is upon the express condition, that the said State shall consist of and have jurisdiction over all the territory included within the following boundaries, and over none other.")

Ch. 6, 24th Cong., 2d Sess., 5 Stat. 144 (1837) ("Whereas, in pursuance of the act of Congress ... a convention of delegates, elected by the people of

the said State of Michigan, for the sole purpose of giving their assent to the ... the said act, did, assent to the provisions of said act ... [T]he state of Michigan shall be one, and is hereby declared to be one of the United States ...")

Minnesota:

Ch. 31, 35th Cong., 1st Sess., 11 Stat. 285 (1858) ("[T]he people of said Territory did[] ... form for themselves a constitution and state government, which is republican in form, and was ratified and adopted by the people ...")

Mississippi:

Res. 1, 15th Cong., 1st Sess., 3 Stat. 472 (1817) ("[I]n pursuance of an act of Congress, ... the people of the said territory did[] ... form for themselves a constitution and state government, which constitution and state government so formed, in republican, and in conformity to the principles of the articles of compact between the original states and the people and states in the territory north-west of the river Ohio ...")

Missouri:

Res. 1, 16th Cong., 2d Sess., 3 Stat. 645 (1821) ("Missouri shall be admitted into this union on an equal footing with the original states, in all respects whatever, upon the fundamental condition, that the fourth clause of the twenty-sixth section of the third article of the constitution submitted on the part of said state to Congress, shall never be construed to authorize the, and that no law shall be passed in conformity thereto, by which any citizen, of either of the states in this Union, shall be excluded from the enjoyment of

any of the privileges and immunities to which such citizen is entitled under the constitution of the United States.")

16 Proclamation, 3 Stat. 797 (1821) ("I, James Monroe, ... have issued this my proclamation, announcing the fact, that the said State of Missouri has assented to the fundamental condition required by the resolution of Congress aforesaid.")

Montana:

1889 Pres. Proc. No. 7, 26 Stat. 1551 (1889) ("[I]t was provided by said act that the Constitution so adopted should be republican in form and make no distinction in civil or political rights on account of race or color, except as to Indians not taxed, and not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence; and that the Convention should by an ordinance irrevocable ... make certain provisions prescribed in said act ... I, Benjamin Harrison, ... declare and proclaim the fact that the conditions imposed by Congress on the State of Montana to entitle that State to admission to the Union have been ratified and accepted ...")

Nebraska:

Ch. 36, 39th Cong., 2d Sess., 14 Stat. 391 (1867) ("[T]he constitution and State government which the people of Nebraska have formed for themselves be, and the same is hereby, accepted, ratified, and confirmed ... [T]his act shall not take effect except upon the fundamental condition that within the State of Nebraska there shall be no denial of the elective franchise, or of any other right, to any

person, by reason of race or color, excepting Indians not taxed.")

1867 Pres. Proc. No. 9, 14 Stat. 820 (1867) ("I, ANDREW JOHNSON, ... declare and proclaim the fact that the fundamental conditions imposed by Congress on the State of Nebraska to entitle that Sate to admission to the Union have been ratified and accepted, and that the admission of the said State into the Union is now complete.")

Nevada:

1864 Pres. Proc. No. 22, 13 Stat. 749 (1864) ("[W]hereas the said constitution and state government have been formed, pursuant to the conditions prescribed by the fifth section of the act of congress ... I, ABRAHAM LINCOLN, ... declare and proclaim that the said State of Nevada is admitted into the Union on an equal footing with the original states.")

New Mexico:

Pub. Res. 62-8, 37 Stat. 39 (1911) ("The Territories of New Mexico and Arizona are hereby admitted into the Union upon an equal footing with the original States[] ... upon the terms and conditions hereinafter set forth. The admission herein provided for shall take effect upon the proclamation of the President of the United States, when the conditions explicitly set forth in this joint resolution shall have been complied with ...")

1912 Pres. Proc. No. 62, 37 Stat. 1723 (1912) ("WHEREAS the Congress of the United Stated did pass a joint resolution, ... which resolution required that the electors of New Mexico should vote upon an amendment of their State

Constitution, which was proposed and set forth at length in said resolution of Congress ... I WILLIAM HOWARD TAFT, ... declare and proclaim the fact that the fundamental conditions imposed by Congress on the State of New Mexico to entitle that State to admission have been ratified and accepted ...")

North Dakota:

1889 Pres. Proc. No. 5, 26 Stat. 1548 (1889) ("Whereas it was provided by said act that the Constitution so adopted should be republican in form and make no distinction in civil or political rights on account of race or color, except as Indians not taxed, and not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence and that the Convention should, by an ordinance irrevocable ... make certain provisions prescribed in said act ... I, Benjamin Harrison, ... declare and proclaim the fact that the conditions imposed by Congress on the State of North Dakota to entitle that State to admission to the Union have been ratified and accepted ...)

Oklahoma:

1907 Pres. Proc. No. 60, 35 Stat. 2160 (1907) ("WHEREAS it appears that the said constitution and government that the said constitution makes no distinction in civil or political rights on account of the race or color; and is not repugnant to the Constitution of the United States or to the principles of the Declaration of Independence, and that it contains all of the six provisions expressly required by Section 3 of the said act to be therein contained ... I, THEODORE ROOSEVELT, ...

declare and announce that the State of Oklahoma is to be deemed admitted by Congress into the Union under and by virtue of the said act on an equal footing with the original States.")

Oregon:

Ch. 33, 35th Cong., 2d Sess., 11 Stat. 383 (1859) ("[T]he people of Oregon have framed, ratified, and adopted a constitution of State government which is republican in form, and in conformity with the Constitution of the United States ...")

South Dakota:

1889 Pres. Proc. No. 6, 26 Stat. 1549 (1889) ("[W]hereas it was provided by said act that the Constitution so adopted should be republican in form and make no distinction in civil or political rights on account of race or color, except as to Indians not taxed, and not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence; and that the Convention should, by an ordinance irrevocable ... make certain provisions prescribed in said act ... I, Benjamin Harrison, ... declare and proclaim the fact that the conditions impose by Congress on the State of North Dakota to entitle that State to admission to the Union have been ratified and accepted ...")

Texas:

Res. 1, 29th Cong., 1st Sess., 9 Stat. 108 (1845) ("WHEREAS the Congress of the United States, by a joint resolution approved March the first, eighteen hundred and forty-five, did consent that the territory properly included within, and rightfully belonging to, the Republic of Texas,

might be erected into a new State, ... and whereas the people of the said Republic of Texas, by deputies in convention assembled, with the consent of the existing government, did adopt a constitution, and erect a new State with a republican form of government and, in the name of the people of Texas, and by their authority, id ordain and declare that they assented to and accepted the proposals, conditions, and guaranties contained in said first and second sections of said resolution ...")

Utah:

1896 Pres. Proc. No. 9, 29 Stat. 876 (1896) ("[W]hereas the Constitution and Government of said proposed State are republican in form, said Constitution is not repugnant to the Constitution of the United States and the Declaration of Independence; and all the provisions of said Act have been complied with in the formation of said Constitution and government ... I, Grover Cleveland, ... declare and proclaim that the terms and conditions prescribed by the Congress of the United States to entitle the State of Utah to admission into the Union have been duly complied with ...")

Washington:

1889 Pres. Proc. No. 8, 26 Stat. 1552 (1889) ("[W]hereas it was provided by said act that the Constitution so adopted should be republican in form and make no distinction in civil or political rights on account of race or color, except as to Indians not taxed, and not be repugnant to the Constitution of the United States and the Convention should by an ordinance irrevocable ...

make certain provisions prescribed in said act ... I, Benjamin Harrison, ... declare and proclaim that fact that the conditions imposed by Congress on the State of Washington to entitle that State to admission to the Union have been ratified and accepted ...")

West Virginia:

Ch. 6, 37th Cong., 3d Sess., 12 Stat. 633 (1862) ("[T]he people inhabiting that portion of Virginia known as West Virginia did ... frame for themselves a Constitution with a view of becoming a separate and independent State; and whereas both the Convention and the Legislature aforesaid have requested that the new State should be admitted into the Union, and the Constitution aforesaid being republican in form, Congress doth hereby consent that the said forty-eight counties may be formed into a separate and independent State. ... *Provided, always*, That this act shall not take effect until after the proclamation of the President of the United States hereinafter provided for.")

1863 Pres. Proc. No. 3, 13 Stat. 731 (1863) ("Whereas ... the State of West Virginia was declared to be one of the United States of America ... upon the condition that certain changes should be duly made in the proposed constitution for that state ... I, ABRAHAM LINCOLN, ... in pursuance of the act of congress aforesaid, declare and proclaim that the said act shall take effect and be in force from and after sixty days from the date hereof.")

Wisconsin:

Ch. 50, 30th Cong., 1st Sess., 9 Stat. 233 (1848) ("[T]he people of the Territory of Wisconsin did, ... by a convention of delegates, called and assembled for that purpose, form for themselves a constitution and State government, which said constitution is republican ...")

Wyoming:

Ch. 664, 51st Cong., 1st Sess., 26 Stat. 222 (1890) ("The people of the Territory of Wyoming did, ... form for themselves as constitution, which constitution was ratified and adopted by the people of said Territory[,] ... which constitution is republican in form and is in conformity with the constitution of the United States.")

APPENDIX C

Congressional Acts Establishing Territories

Alabama:

Ch. 59, 14th Cong., 2d Sess., 3 Stat. 371 (1817) ("[A]ll that part of the Mississippi territory which lies within the following boundaries ... .shall for the purpose of a temporary government, constitute a separate territory, and be called 'Alabama.'")

Alaska:

Pub. L. 62-334, 37 Stat. 512 (1912) ("[T]he territory ceded to the United States by Russia ... and known as Alaska, shall be and constitute the Territory of Alaska under the laws of the United States, the government of which shall be organized and administered as provided by said laws.")

Arizona:

Ch. 56, 37th Cong., 3d Sess., 12 Stat. 664 (1863) ("[A]ll that part of the present Territory of New Mexico situate west of a line running due south from ... be, and the same is hereby, erected into a temporary government by the name of the Territory of Arizona.")

Arkansas:

Ch. 49, 15th Cong., 2d Sess., 3 Stat. 493 (1819) ("[A]ll that part of the territory of Missouri which lies ... shall, for the purpose of a territorial government, constitute a separate territory, and be called the Arkansaw territory.")

Colorado:

Ch. 59, 36th Cong., 2d Sess., 12 Stat. 172 (1861) ("[A]ll that part of the territory of the United States included within the following limits ... be and the same is hereby erected into a temporary government by the name of the Territory of Colorado.")

Florida:

Ch. 13, 17th Cong., 1st Sess., 3 Stat. 654 (1822) ("[A]ll the territory ceded by Spain to the United States, known by the name of East and West Florida, shall constitute a territory of the United States, under the name of the territory of Florida, the government whereof shall be organized and administered as follows...")

Idaho:

Ch. 117, 37th Cong., 3d Sess., 12 Stat. 808 (1863) ("[A]ll that part of the territory of the United States included within the following limits ... be and the same is hereby erected into a temporary government by the name of the Territory of Colorado.")

Illinois:

Ch. 13, 10th Cong., 2d Sess., 2 Stat. 514 (1809) ("[A]ll that part of the Indiana territory which lies [within specified boundaries] shall, for the purposes of temporary government, constitute a separate territory, and be called Illinois.")

Indiana:

Ch. 41, 6th Cong., 1st Sess., 2 Stat. 58 (1800) ("[A]ll that part of the territory of the United States northwest of the Ohio river, which lies

[within specified boundaries], shall for the purposes of temporary government, constitute a separate territory, and be called the Indiana Territory.")

Iowa:

Ch. 96, 25th Cong., 2d Sess., 5 Stat. 235 (1838) ("[A]ll that part of the present Territory of Wisconsin which lies [within specified boundaries] shall, for the purposes of temporary government, be and constitute a separate Territorial Government by the name of Iowa.")

Kansas:

Ch. 59, 33d Cong., 1st Sess., 10 Stat. 277, 284 (1854) ("[A]ll that part of the territory of the United States included within the following limits ... be, and the same is hereby, created into a temporary government by the name of the Territory of Kansas.")

Louisiana:

Ch. 38, 8th Cong., 1st Sess., 2 Stat. 283 (1804) ("[A]ll that portion of country ceded by France to the United States, under the name of Louisiana, which lies [within specified boundaries], shall constitute a territory of the United States, under the name of the territory of Orleans, the government whereof shall be organized and administered as follows...")

Michigan:

Ch. 5, 8th cong., 2d Sess., 2 Stat. 309 (1805) ("[A]ll that part of the Indiana territory, which lies [within specified boundaries], shall, for the

purposes of temporary government, constitute a separate territory, and be called Michigan.")

Minnesota:

Ch. 121, 30th Cong., 2d Sess., 9 Stat. 403 (1849) ("[A]ll that part of the territory of the United States which lies within the following limits ... be, and the same is hereby, erected into a temporary government by the name of the Territory of Minnesota.")

Mississippi:

Ch. 28, 5th Cong., 2d Sess., 1 Stat. 549 (1798) ("[A]ll that tract of country [within specified boundaries] shall be, and hereby is constituted one district, to be called the Mississippi Territory; and the President of the United States is hereby authorized to establish therein a government in all respects similar to that now exercised in the territory northwest of the River Ohio ...")

Missouri:

Ch. 95, 12th Cong., 1st Sess., 2 Stat. 743 (1812) ("[T]he territory heretofore called Louisiana shall hereafter be called Missouri, and [ ] the temporary government of the Territory of Missouri shall be organized and administered in the manner herein after prescribed.")

Montana:

Ch. 95, 38th Cong., 1st Sess., 13 Stat. 85 (1864) ("[A]ll that part of the territory of the United States included within the limits ... be, and the same is hereby, created into a temporary government by the name of the Territory of Montana.")

Nebraska:

Ch. 59, 33d Cong., 1st Sess., 10 Stat. 277 (1854) ("[A]ll that part of the territory of the United States included within the following limits ... be, and the same is hereby, created into a temporary government by the name of the Territory of Nebraska.")

Nevada:

Ch. 83, 36th Cong., 2d Sess., 12 Stat. 209 (1861) ("[A]ll that part of the territory of the United States, included within the following limits, ... be, and the same is hereby, erected into a temporary government by the name of the Territory of Nevada.")

New Mexico:

Ch. 49, 31st Cong., 1st Sess., 9 Stat. 446 (1850) ("[A]ll that portion of the Territory of the United States bounded as follows ... be, and the same is hereby, erected into a temporary government, by the name of the Territory of New Mexico.")

North Dakota:

Ch. 86, 36th Cong., 2d Sess., 12 Stat. 239 (1861) ("[A]ll that part of the territory of the United States included within the following limits ... be, and the same is hereby, organized into a temporary government, by the name of the Territory of Dakota.")

Ch. 180, 50th Cong., 2d Sess., 25 Stat. 676 (1889) ("The area comprising the Territory of Dakota shall, before the purposes of this act, be divided of the seventh standard parallel ... and the delegates elected as hereinafter provided the constitutional

convention in districts north of said parallel shall assemble in convention ... at the city of Bismarck; and the delegated elected in the districts south of said parallel shall ... assemble in convention at the city of Sioux Falls.")

Ohio:

Northwest Ordinance of 1787, re-enacted by Ch. 8, 1st Cong., 1st Sess., 1 Stat. 51 (1789) ("An Ordinance for the government of the Territory of the United States northwest of the River Ohio. Be it ordained ... that the said territory, for the purposes of temporary government, be one district, subject, however, to be divided into two districts, as future circumstances may, in the opinion of Congress, make it expedient.")

Oklahoma:

Ch. 182, 51st Cong., 1st Sess., 26 Stat. 81 (1890) ("[A]ll that portion of the United States now knowns as the Indian Territory ... is hereby erected into a temporary government by the name of the Territory of Oklahoma.")

Oregon:

Ch. 177, 30th Cong., 1st Sess., 9 Stat. 323 (1848) ("[A]ll that part of the Territory of the United States which lies [within specified boundaries], known as the Territory of Oregon, shall be organized into and constitute a temporary government by the name of the Territory of Oregon.")

South Dakota:

Ch. 86, 36th Cong., 2d Sess., 12 Stat. 239 (1861) ("[A]ll that part of the territory of the United

States included within the following limits ... be, and the same is hereby, organized into a temporary government, by the name of the Territory of Dakota.")

Ch. 180, 50th Cong., 2d Sess., 25 Stat. 676 (1889) ("The area comprising the Territory of Dakota shall, before the purposes of this act, be divided of the seventh standard parallel ... and the delegates elected as hereinafter provided the constitutional convention in districts north of said parallel shall assemble in convention ... at the city of Bismarck; and the delegated elected in the districts south of said parallel shall ... assemble in convention at the city of Sioux Falls.")

Tennessee:

Ch. 14, 1st Cong., 2d Sess., 1 Stat. 123 (1790) ("[T]he territory of the United States south of the river Ohio, for the purposes of temporary government, shall be one district.")

Utah:

Ch. 51, 31st Cong., 1st Sess., 9 Stat. 453 (1850) ("[A]ll that part of the territory of the United States included within the following limits ... be, and the same is hereby, created into a temporary government, by the name of the Territory of Utah.")

Washington:

Ch. 90, 32d Cong., 2d Sess., 10 Stat. 172 (1853) ("[F]rom and after the passage of this act, all that portion of the Oregon Territory lying and being [within specified boundaries] be organized and constitute a temporary government by the name of the Territory of Washington.")

Wisconsin:

Ch. 54, 24th Cong., 1st Sess., 5 Stat. 10 (1824) ("[T]he country included within the following boundaries shall constitute a separate Territory, for the purposes of temporary government, by the name of Wisconsin.")

Wyoming:

Ch. 235, 40th Cong., 2d Sess., 15 Stat. 178 (1868) ("[A]ll that part of the United States described as follows ... be, and the same is hereby, organized into a temporary government by the name of the Territory of Wyoming.")

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IN THE

Supreme Court of the United States

COMMONWEALTH OF PUERTO RICO,
Petitioner,

v.

LUIS M. SÁNCHEZ VALLE AND
JAIME GÓMEZ VÁZQUEZ,
Respondents.

On Writ of Certiorari to the Supreme Court of Puerto Rico

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QUESTION PRESENTED

Whether the Commonwealth of Puerto Rico and the federal government are separate sovereigns for purposes of the Double Jeopardy Clause of the United States Constitution.

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STATEMENT OF THE CASE

A. Background

Puerto Rico, previously a colony of Spain, became a territory of the United States under the Treaty of Paris, which was ratified in 1899 after America won the Spanish-American War. JA56. The Treaty of Paris stated that Congress would determine "[t]he civil rights and political status" of Puerto Ricans. JA62.

Exercising its constitutional power to "make all needful Rules and Regulations respecting the Territor[ies]," U.S. Const. art. IV, § 3, cl. 2, Congress has repeatedly delegated power to local Puerto Rican authorities. Congress's first delegation of power to Puerto Rico was through the Foraker Act in 1900, which established a government for Puerto Rico and allowed Puerto Ricans to elect their own House of Delegates. JA67, 79-80.

Over time, Congress granted Puerto Rico additional autonomy. In 1917, Congress passed the Jones Act, which, among other changes, created a popularly elected Puerto Rican Senate. JA107-08. In 1947, Congress enacted legislation permitting Puerto Ricans to elect their own governor, who would appoint the heads of almost every executive department in Puerto Rico. *See* Pub. L. 80-362, 61 Stat. 770 (1947). Accordingly, by 1948, Puerto Ricans were electing their own governor and both houses of their legislature.

In 1950, Congress enacted legislation authorizing the Puerto Rican people to adopt a new territorial constitution, but retaining for itself the authority to review that constitution before it became effective.

Pet. App. 353a-54a ("Public Law 600"). In accordance with Public Law 600, Puerto Rico called a convention to draft its proposed constitution, which was approved by Puerto Rican voters in March 1952. *See* H.R. Rep. 82-1832, at 1-2 (1952).

Congress approved the Puerto Rican Constitution, subject to changes. *See* Pet. App. 355a-57a. Puerto Rico's constitutional convention acceded to Congress's terms, and the Constitution became effective on July 25, 1952. *See Proclamation: Establishing the Commonwealth of Puerto Rico*, July 25, 1952, P.R. Laws Ann. Hist. § 10. The approval of the Puerto Rican Constitution, however, did not alter Puerto Rico's status as a territory under Article IV *Harris v. Rosario*, 446 U.S. 651, 651-52 (1980) (per curiam).

B. Proceedings Below

Respondent Luis Sánchez Valle was indicted in Puerto Rican territorial court for, *inter alia*, selling a firearm and ammunition without a permit, *see* 25 P.R. Laws Ann. § 458. JA11-14. Based on the same incident, he subsequently pleaded guilty in federal court to illegally trafficking firearms and ammunition, in violation of 18 U.S.C. §§ 922(a)(1)(A), 923(a), 924(a)(1)(D), 924(a)(2). JA21-30.

Respondent Jaime Gómez Vázquez was indicted in Puerto Rican territorial court for, *inter alia*, selling a firearm without a permit, *see* 25 P.R. Laws Ann. § 458. JA31-34. Based on the same incident, he subsequently pleaded guilty in federal court to illegally trafficking firearms, in violation of 18 U.S.C. §§ 922(a)(1)(A), 923(a), 924(a)(1)(D). JA44-55.

Following their federal guilty pleas, the territorial court dismissed all charges against Respondents on double jeopardy grounds. Pet. App. 3a-6a. The Puerto Rico Court of Appeals reversed, holding that Puerto Rico and the United States are separate sovereigns, and thus there is no double jeopardy bar to dual prosecutions. Pet. App. 268a.

As relevant here, the Puerto Rico Supreme Court reversed. In a thorough opinion, the court concluded that Puerto Rico and the United States are the same sovereign for purposes of double jeopardy because Puerto Rico is constitutionally a territory. Pet. App. 1a-69a.

Chief Justice Fiol Matta, joined by Justice Oronoz Rodríguez, concurred in the result. The concurrence would have instead relied on the Puerto Rican Constitution's protection against double jeopardy. Pet. App. 71a-190a. Justice Rodríguez Rodríguez dissented. Pet. App. 191a-242a.

SUMMARY OF ARGUMENT

1. Puerto Rico and the United States are not separate sovereigns for purposes of the Double Jeopardy Clause. Under the Constitution, a territorial government "owes its existence wholly to the United States." *Grafton v. United States*, 206 U.S. 333, 354 (1907). Consequently, the dual-sovereignty exception "do[es] not apply." *Id.* at 355. This principle holds true even when a territory is elevated to "a commonwealth" and vested with "many of the attributes of *quasi*-sovereignty possessed by the states." *Puerto Rico v. Shell Co. (P.R.)*, 302 U.S. 253, 262 (1937). What

matters for double jeopardy purposes is the fact that such an entity, unlike a sovereign state, "'derive[s] its powers from the United States.'" *Id.* at 265.

The Court's cases drawing this conclusion reflect fundamental features of the Constitution's design. The "'residuary and inviolable sovereignty'" of the states "is reflected throughout the Constitution's text." *Printz v. United States*, 521 U.S. 898, 918-19 (1997). By contrast, the Constitution does nothing to recognize or protect the "sovereignty" of territories, which are mentioned only as subjects of Congress's plenary power. The notion of a "sovereign territory"—a polity of congressional design that nonetheless does not derive its power from Congress, and which lacks all the traditional sovereign prerogatives of states—is foreign to the Constitution.

2. Consistent with the constitutional distinction between states and territories, Congress has not conferred sovereignty on Puerto Rico. The 1950-1952 legislation authorizing Puerto Rico to adopt a constitution represented a historic but distinctly limited delegation of power. It did not oust the United States as the "ultimate source of the power" exercised by the territorial government. *United States v. Wheeler*, 435 U.S. 313, 320 (1978). Before that legislation was enacted, Puerto Rico enjoyed a "sweeping ... congressional grant of power," including the power to elect a territorial legislature that would enact criminal laws, and yet was not a separate sovereign. *Shell*, 302 U.S. at 263. An additional layer of delegation—permitting Puerto Ricans to set the parameters for the election of their officials and for the

laws they enact—cannot transform delegated federal power into power that originates or inheres in Puerto Rico.

3. Petitioner's suggestion that Public Law 600 is an unamendable super-statute—permanently abdicating Congress's power over Puerto Rico—is incompatible with basic constitutional principles and with the historical record. The same historical record also belies two key premises of Petitioner's argument that the 1950-1952 legislation established Puerto Rican sovereignty. First, Congress did not grant Puerto Ricans the unfettered authority to enact a constitution of their choosing; to the contrary, Congress struck a key provision of the constitution as originally approved by Puerto Ricans, and disabled Puerto Ricans from adopting it in the future. Second, the Puerto Rican Constitution did not free Puerto Rico from federal authority over its internal affairs. To the contrary, Congress has continued to exercise authority over many aspects of Puerto Rico's governance.

4. Although Petitioner compares itself to Indian tribes, that analogy, too, is unavailing. Indian tribes are sovereigns separate from the United States because they were originally "self-governing sovereign political communities," and they have never since "given up their full sovereignty." *Wheeler*, 435 U.S. at 322-23. Puerto Rico, by contrast, has never been a sovereign entity. Indeed, *Wheeler* expressly reaffirmed that territories, unlike Indian tribes, are *not* sovereigns. *Id.* at 321.

5. Although Petitioner insists upon its own sovereignty, it is unable to propose a rule capable of repeated application. Petitioner's indeterminate test for determining sovereignty is both troublesome as a matter of theory, and will inject uncertainty into the political status of other sub-national entities. Petitioner also refuses to reckon with the potentially sweeping implications of its position, which cast doubt on basic aspects of the legal framework governing Puerto Rico.

6. Recognizing that Puerto Rico is not sovereign does not, as Petitioner suggests, disparage the dignity of the Puerto Rican people. Rather, it pays them the respect of honestly acknowledging the present reality: Puerto Rico is a territory of the United States, and thus is not sovereign.

ARGUMENT

The Double Jeopardy Clause states that no person shall "be twice put in jeopardy" for "the same offence." U.S. Const. amend. V This Court has held that the Double Jeopardy Clause does not bar successive prosecutions for crimes with the same substantive elements, so long as those prosecutions are initiated by separate "sovereigns." *See Heath v. Alabama*, 474 U.S. 82, 87-88 (1985). This case presents the question of whether Puerto Rico is a sovereign separate from the United States.

The answer is no. As this Court has repeatedly held, under our Constitution, states are sovereign, but territories are not. Because Puerto Rico is a territory, it cannot be considered a sovereign. Petitioner

contends that Congress conferred sovereignty on Puerto Rico in 1952 when it enacted legislation approving the Puerto Rican Constitution. But a close examination of that legislation demonstrates that it constituted a delegation of power to Puerto Rico, not an establishment of sovereignty. Because the "ultimate source of the power" exercised by Puerto Rico is the United States, *Wheeler*, 435 U.S. at 320, the Puerto Rico Supreme Court's decision should be affirmed.

I. UNDER THE CONSTITUTION, STATES ARE SOVEREIGN, AND TERRITORIES ARE NOT.

A. This Court's Double Jeopardy Cases Have Unanimously Held That States Are Sovereign, and Territories Are Not.

This case begins and ends with an unbroken line of cases from this Court, dating back over a century, holding that under the Double Jeopardy Clause, states are sovereign, and territories are not.

The first of this Court's double jeopardy cases to address the constitutional distinction between states and territories was *Grafton v. United States*, 206 U.S. 333 (1907). In *Grafton*, the Court held that the Double Jeopardy Clause did not permit successive prosecutions by the United States and the Philippine Islands for the same offense. The Court rested its analysis on a basic principle of constitutional structure: Whereas "[t]he government of the United States and the governments of the several states, in the exercise of their respective powers, move on different lines," the territorial

government of the Philippines "owes its existence wholly to the United States." *Id.* at 354. "The jurisdiction and authority of the United States over that territory and its inhabitants, for all legitimate purposes of government, is paramount." *Id.* Consequently, "the cases holding that the same acts committed in a state of the Union may constitute an offense against the United States and also a distinct offense against the state do not apply here, where the two tribunals that tried the accused exert all their powers under and by authority of the same government—that of the United States." *Id.* at 354-55.

The Court reaffirmed this holding—and specifically extended it to Puerto Rico—in *Puerto Rico v. Shell Co. (P.R.)*, 302 U.S. 253 (1937). The Court first observed that, through the Foraker and Jones Acts, Congress had granted Puerto Rico "full power of local self-determination, with an autonomy similar to that of the states and incorporated territories." *Id.* at 261-62. "The effect was to confer upon the territory many of the attributes of *quasi*-sovereignty possessed by the states," and to erect "the typical American governmental structure, consisting of the three independent departments." *Id.* at 262. "The power of taxation, the power to enact and enforce laws, and other characteristically governmental powers were vested." *Id.* By virtue of Congress's delegations, the Court explained, "[a] body politic—a commonwealth—was created." *Id.* (internal quotation marks omitted).

But despite "the sweeping character of the congressional grant of power" to Puerto Rico, the Court found it "clear" that "[b]oth the territorial and

federal laws ... are creations emanating from the same sovereignty." *Id.* at 263-64. "The situation presented," the Court reasoned, "was, in all essentials, the same as that presented" in *Grafton*. *Id.* at 265. Specifically, the essential point remained that "'[t]he government of a state does not derive its powers from the United States,'" whereas territorial governments—including Puerto Rico's—"owed their existence to the ... supreme authority" of the United States. *Id.* (quoting *Grafton*, 206 U.S. at 354). Accordingly, "legislative duplication" between territorial and federal law "gives rise to no danger of ... double punishment for the same offense," because "[p]rosecution under one of the laws in the appropriate court, necessarily, will bar a prosecution under the other law in another court." *Id.* at 264.[1]

This Court has adhered to *Grafton*'s understanding of the distinction between states and territories even after Congress's delegation of additional powers to Puerto Rico in the early 1950s. Indeed, the Court has relied on the proposition that territories cannot be sovereigns as a fixed point to guide other judgments about the scope of the dual-sovereignty exception. First, in *Waller v. Florida*, 397 U.S. 387 (1970), the

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[1] Petitioner relies on cases such as *In re Murphy*, 40 P. 398 (Wyo. 1895), and *State v. Norman*, 52 P. 986 (Utah 1898), for the proposition that territories have historically been viewed as separate sovereigns. Pet. Br. 23. But in *Shell*, the Court specifically stated that those cases were wrongly decided: "The Wyoming and the Utah courts thought that prosecution and punishment could be had under both statutes ... This, of course, in the light of our later decision in the *Grafton* case, is now seen to be erroneous[.]" 302 U.S. at 267.

Court concluded that municipalities are not sovereigns separate from the states of which they are a part. As the Court explained, "the apt analogy to the relationship between municipal and state governments is to be found in the relationship between the government of a Territory and the Government of the United States." *Id.* at 393. "The legal consequence of that relationship," the Court said, "was settled in *Grafton*, where this Court held that a prosecution in a court of the United States is a bar to a subsequent prosecution in a territorial court, since both are arms of the same sovereign." *Id.* (citation omitted).

The Court further elaborated on this distinction in *United States v. Wheeler*, 435 U.S. 313 (1978). *Wheeler* held that, for double jeopardy purposes, Indian tribes exercise sovereignty distinct from that of the United States. As part of its analysis, the Court reviewed the fundamental doctrinal distinction between states and territories. The dual-sovereignty exception, the Court said, rests "on the basic structure of our federal system, in which States and the National Government are separate political communities." *Id.* at 320. By contrast, "a territorial government is entirely the creation of Congress, 'and its judicial tribunals exert all their powers by authority of the United States.'" *Id.* at 321 (quoting *Grafton*, 206 U.S. at 354). "When a territorial government enacts and enforces criminal laws to govern its inhabitants, it is not acting as an independent political community like a State, but as an agency of the federal government." *Id.* (internal quotation marks omitted).

The Court underscored this distinction yet again in *Heath v. Alabama*, 474 U.S. 82 (1985). *Heath* explained that states are considered "separate sovereigns" under the Double Jeopardy Clause because "[t]heir powers to undertake criminal prosecutions derive from separate and independent sources of power and authority originally belonging to them before admission to the Union and preserved to them by the Tenth Amendment." *Id.* at 89. By contrast, successive prosecutions by federal and territorial courts are barred "because such courts are 'creations emanating from the same sovereignty.'" *Id.* at 90 (quoting *Shell*, 302 U.S. at 264).

The Court has never said anything inconsistent with these repeated and unqualified statements that territories, unlike states, exercise the same sovereignty as the United States for purposes of the Double Jeopardy Clause.

B. Constitutional Structure and History Confirm that States are Sovereign, and Territories Are Not.

1. The Constitution recognizes and preserves the sovereignty of the states, but it does not authorize the creation of a sovereign territory.

Petitioner's central submission is that the unbroken line of cases recounted above must be set aside to accommodate a special status that Congress conferred on Puerto Rico in 1952. But this argument is a constitutional non-starter. The Court's precedent

distinguishing states and territories reflects fundamental attributes of the Constitution's federal structure that Congress is without power to modify.

In *Heath*, the Court explained that "sovereignty" did not carry any special meaning in the double jeopardy context; rather, the characterization of states as sovereign for double jeopardy purposes simply reflected the basic constitutional principle that states are sovereign entities. 474 U.S. at 89 ("[States'] powers to undertake criminal prosecutions derive from separate and independent sources of power and authority originally belonging to them before admission to the Union and preserved to them by the Tenth Amendment."). As such, an analysis of whether territories, like states, may be considered sovereign for double jeopardy purposes requires an examination of whether the Constitution recognizes any concept of territorial sovereignty.

It does not. The Constitution sharply distinguishes between states and territories. States are "residuary sovereigns and joint participants in the governance of the Nation." *Alden v. Maine*, 527 U.S. 706, 748 (1999). As "'members of the federation'" that comprises the United States, *id.* at 748-49, they "entered the Union 'with their sovereignty intact,'" *Fed. Mar. Comm'n v. S.C. Ports Auth.*, 535 U.S. 743, 751 (2002). The Constitution therefore recognizes the pre-existing, "inherent" sovereignty of the states, and it preserves that sovereignty in the Tenth Amendment. *Heath*, 474 U.S. at 89.

Of course, the Constitution also authorizes Congress to admit new states. But admitting a territory as a

state vests it with the sovereignty that attends states under the Constitution. *Coyle v. Smith*, 221 U.S. 559, 566 (1911) ("The definition of 'a state' is found in the powers possessed by the original states which adopted the Constitution[.]"). Such treatment is necessary to ensure that the United States remains "a union of states[] equal in power, dignity, and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself." *Id.* at 567.

By contrast, the Constitution neither recognizes, nor preserves, any form of territorial sovereignty. Whereas the "'residuary and inviolable sovereignty'" of the states "is reflected throughout the Constitution's text," *Printz*, 521 U.S. at 918-19, the Constitution's sole reference to territories is that they are subject to Congress's plenary "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. art. IV, § 3, cl. 2. The natural inference is that states are sovereigns within our constitutional order, and territories are not—which is precisely what the Court has held in its long line of double jeopardy cases.

Nonetheless, Petitioner finds in the Territory Clause a hidden authorization for Congress to create two fundamentally different types of territories: sovereign territories and non-sovereign territories. This is not plausible. The framers of the Constitution were keenly sensitive to the distinction between sovereign and non-sovereign entities—a distinction that was pivotal in debates about the status of states

under the Constitution. *See, e.g.*, The Federalist No. 45, at 290 (James Madison) (C. Rossiter ed. 1961) (situating the "very extensive portion of active sovereignty" retained by the states relative to different historical paradigms); The Federalist No. 32, at 198 (Alexander Hamilton) (arguing that the states would ret in their "rights of sovereignty"). It is inconceivable that they would have lumped together sovereign entities with non-sovereign ones under the broad rubric of federal "Territory"—which is itself cast as merely a species of federal "Property," U.S. Const. art. IV, § 3, cl. 2—subject to Congress's plenary power and lacking any countervailing constitutional rights whatsoever.

The Court confirmed this point over a century ago:

> All territory within the jurisdiction of the United States not included in any State must necessarily be governed by or under the authority of Congress. The Territories are but political subdivisions of the outlying dominion of the United States. Their relation to the general government is much the same as that which counties bear to the respective States, and Congress may legislate for them as a State does for its municipal organizations.

First Nat'l Bank v. County of Yankton, 101 U.S. 129, 133 (1879). Thus, the Constitution recognizes states, which are sovereign, and territories, which are governed either "by" or "under the authority of" Congress. *Id.* It does not recognize the intermediate status of "sovereign territory." Petitioner emphasizes that Puerto Rico is now referred to as a "commonwealth," but "commonwealth" is not a

constitutional category lying outside of the recognized categories of states and territories.

The Founders' decision to recognize states, but not territories, as sub-national sovereigns was an important part of the constitutional plan. In our system of divided sovereignty, states occupy a unique and fundamental role. *See Alden*, 527 U.S. at 751. Contrary to Petitioner's submission, the Constitution does not authorize Congress to further subdivide the "atom of sovereignty" that the Founders "split" between the states and the federal government. *Id.* Indeed, the Court has been careful to ensure that Congress may not use its leverage over new states to adjust the constitutional division of sovereignty. *Coyle*, 221 U.S. at 566 ("[W]hat is this power? It is not to admit political organizations which are less or greater, or different in dignity or power, from those political entities which constitute the Union. It is ... a 'power to admit states.'"). Just as the Constitution does not permit Congress to admit 'states' that lack the rights and benefits attending that status, it provides no mechanism for Congress to create sub-national sovereigns of its own design that lack traditional states' rights.

2. The constitutional mechanisms for recognizing and preserving state sovereignty do not apply to territories.

A close examination of the Constitution's mechanisms for recognizing and preserving state sovereignty confirms that territories cannot be sovereign.

"The federal system established by our Constitution preserves the sovereign status of the States in two ways." *Alden*, 527 U.S. at 714. "First, it reserves to them a substantial portion of the Nation's primary sovereignty, together with the dignity and essential attributes inhering in that status." *Id.* It does this by ensuring that Congress has only enumerated powers, while the states retain a general police power. *See id.* As such, it is impossible to characterize the states' police power as a delegation of federal power. By contrast, territories, including Puerto Rico, are subject to precisely the plenary control of the federal government that the Founders eschewed with respect to states. Under the Constitution, any powers reserved to a territorial government can only be delegations of the plenary power that the Territory Clause vests in Congress; no "portion of the Nation's primary sovereignty" inheres in the territorial government itself. *See Alden*, 527 U.S. at 714.

Second, "even as to matters within the competence of the National Government," the Constitution ensured that State and Federal Governments would exercise "concurrent authority over the people," rather than permitting the federal government to "'act upon and through the States.'" *Id.* Accordingly, the Court has recognized several constitutional constraints, stemming from the Tenth Amendment, on Congress's ability to interfere with the states' exercise of their own authority. For instance, the Court has struck down statutes that commandeered state governments (*see New York v. United States*, 505 U.S. 144 (1992), and *Printz*, 521 U.S. 898) and statutes that forced state

governments into court in violation of their sovereign immunity (*see Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), and *Alden*, 527 U.S. 706). Again, as the Court has emphasized, the invalidity of those statutes reflects the fact that states are truly sovereign; Congress lacks the authority to interfere with fundamental sovereign attributes of the states, and so the ultimate authority over those attributes does not reside in Congress. And again, territories, including Puerto Rico, are different: they possess no Tenth Amendment rights, and the Constitution contains no limitation, explicit or implicit, on Congress's plenary power to make, unmake, or interfere with territorial governments.

The same analysis applies to sovereign immunity. Territories' immunity from suit arises solely from congressional will, not from any inherent sovereign status. In *Porto Rico v. Rosaly y Castillo*, 227 U.S. 270 (1913), the Court held that Puerto Rico enjoyed a common-law immunity from suit based on congressional intent—a notion antithetical to the theory underlying state sovereign immunity. To be sure, the Court has not decided whether Congress could abrogate Puerto Rico's immunity after 1952. But *Seminole Tribe* and *Alden* were explicitly premised on the rights of states under the Constitution, and it is difficult to understand any constitutional basis for restricting Congress from exercising this power over

territories. *See Seminole Tribe*, 517 U.S. at 67; *Alden*, 527 U.S. at 713-14.[2]

3. Territories do not possess two fundamental attributes of state sovereignty: equality and a political voice.

The Constitution recognizes and preserves state sovereignty in two additional respects. It guarantees *equality* between the states, and it guarantees the states a *political voice*. Both guarantees are unavailable to territories, including Puerto Rico.

1. The Court has recognized the guarantee of equality among the states as a fundamental attribute of their sovereignty. Indeed, *Heath* identifies the states' "equal[ity] to each other" as an attribute of state sovereignty in the double jeopardy context. 474 U.S. at 89. This "fundamental principle of *equal* sovereignty among the States" means not only that the states enter the Union on an equal footing, but that they must be treated equally thereafter as well. *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2623 (2013) (internal quotation marks omitted). The Court has never demanded perfect equality, but it has required a strong justification for unequal treatment, and it has invalidated statutes that cannot meet this requirement. *See id.*

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[2] Whether Congress can abrogate Puerto Rico's sovereign immunity remains open in the First Circuit. *Jusino Mercado v. Puerto Rico*, 214 F.3d 34, 44 (1st Cir. 2000).

By contrast, in *Harris v. Rosario*, 446 U.S. 651 (1980) (per curiam)—a case issued long after the 1950-1952 legislation—the Court held that because Puerto Rico is a territory, Congress can treat it differently from the states for any reason that passes the highly deferential rational basis test. Thus, in *Harris*, the Court concluded that Congress could deny welfare benefits to Puerto Ricans that are available to other citizens because equal treatment would be too expensive and might "disrupt the Puerto Rican economy." *Id.* at 652. As Justice Marshall's dissent points out, these rationales are questionable. *See id.* at 655-56 (Marshall, J., dissenting). But Congress's plenary power insulates them from searching judicial review.

Puerto Rico continues to be treated differently from the states in many respects: for example, Supplemental Security Income, one of the Social Security programs, is unavailable; federal Medicaid spending is capped at a fraction of the typical federal contribution; Medicare reimbursement rates are significantly reduced; and a block grant serves as a limited substitute for the Supplemental Nutrition Assistance Program available in the states. *See* U.S. Gov't Accountability Office, GAO-14-31, *Puerto Rico: Information on How Statehood Would Potentially Affect Selected Federal Programs and Revenue Sources* 15-16 (2014). The constitutional basis of Congress's distinct treatment of Puerto Rico is that Puerto Rico is subject to Congress's plenary power and lacks the dignity of equal sovereignty.

Moreover, under current law, Puerto Rico is unequal to the states in an even more fundamental sense: Puerto Ricans are not entitled to the protection of the entire Constitution. In a series of decisions commonly known as the *Insular Cases*, the Court held that Puerto Rico was not "incorporated" into the United States. *E.g.*, *Downes v. Bidwell*, 182 U.S. 244, 341-42 (1901) (White, J., concurring).[3] Thus, it held that only "fundamental" portions of the Constitution apply in Puerto Rico.[4] *Id.* at 291; *see also Balzac v. Porto Rico*, 258 U.S. 298, 309 (1922) (Sixth Amendment right to jury trial does not apply in Puerto Rico).

The *Insular Cases* have been vigorously criticized over the years, *see, e.g.*, *Torres v. Puerto Rico*, 442 U.S. 465, 475-76 (1979) (Brennan, J., concurring in the judgment), and even if they were abrogated, Respondents' position would not change: a territory of the United States, whether it is incorporated or unincorporated, is not "sovereign." But at present, the *Insular Cases* remain the law, and they are the ultimate expression of inequality between Puerto Rico and the fifty sovereign states.

2. The Court has also characterized a *political voice* as an aspect of sovereignty. The Court has thus recognized the states' various roles "in the structure of the Federal Government itself" as an important

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[3] Justice White's concurrence has long been recognized as "the settled law of the court." *Balzac v. Porto Rico*, 258 U.S. 298, 305 (1922).

[4] Respondents agree with Petitioner that the Double Jeopardy Clause applies in Puerto Rico. Pet. Br. 19-21.

"measure of state sovereignty." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550-51 (1985). For example, the Founders understood the states' powers to choose two senators apiece and to cast electoral votes as attributes of their sovereignty. *See id.* at 551-52 (noting that "Madison placed particular reliance on the equal representation of the States in the Senate, which he saw as 'at once a constitutional recognition of the portion of sovereignty remaining in the individual States, and an instrument for preserving that residuary sovereignty'" (quoting The Federalist No. 62)). Of course, a state's wish may not always prevail; but the very existence of a *say* in ultimate decisions made by the United States is a key "constitutional recognition of the portion of sovereignty remaining in the individual States." Federalist No. 62, at 378 (James Madison).

Unlike the states, the Constitution affords Puerto Rico no political voice in federal elections. Puerto Ricans cannot vote for President and, although they elect a non-voting Resident Commissioner, they lack a voting representative in either house of Congress. Puerto Rico is thus in the unique position of both lacking states' sovereign protections against congressional power, and also lacking political avenues to influence the exercise of that power. And, of course, Petitioner makes no suggestion that declaring Puerto Rico a "sovereign" for double jeopardy purposes will alter this reality.

The Constitution's conception of sovereignty is manifest in the myriad principles that account for the sovereign prerogatives of the states. These include the absence of a federal police power; the Tenth

Amendment bar on federal commandeering; true sovereign immunity; equality vis-à-vis other states; and an institutional voice in national decisions. The Founders considered *each* of these attributes vital to duly recognizing and preserving the sovereignty of the states; a territory cannot plausibly be considered sovereign under the Constitution when it possesses *none* of them.

II. THE 1950-1952 LEGISLATION DID NOT CONFER SOVEREIGNTY ON PUERTO RICO.

Notwithstanding the profound constitutional distinctions between states and territories, Petitioner contends that Congress conferred sovereignty on Puerto Rico when it enacted legislation authorizing the drafting of the Puerto Rican Constitution in 1950, and approved it with modifications in 1952. For the reasons explained above, however, the Constitution does not grant Congress the power to create such a "sovereign territory." And a review of the 1950-1952 legislation confirms that Congress acted within its constitutional powers and did not transform Puerto Rico into a sovereign. The 1950-1952 legislation constituted a delegation of power to Puerto Ricans; it did not oust the United States as the "ultimate source of the power" that was delegated. *Wheeler*, 435 U.S. at 320.

A. Because Congress Delegated The Authority To Adopt The Puerto Rico Constitution, The Power Exercised Under That Constitution Flows From Congress.

The Double Jeopardy Clause requires an analysis of "the *ultimate* source of the power under which the respective prosecutions were undertaken." *Id.* (emphasis added). Even though the 1950-1952 legislation represented a substantial delegation of power to Puerto Rico, it did not change the fact that the ultimate source of Puerto Rico's power to prosecute local crimes is the federal government.

Petitioner apparently concedes—as it must, in light of *Shell*—that prior to the 1950-1952 legislation, Puerto Rico was not sovereign. Yet at the time of *Shell*, Congress had already delegated to Puerto Ricans the power to elect a legislature that would enact territorial laws. Indeed, Congress had granted Puerto Rico "full power of local self-determination," and had conferred "many of the attributes of *quasi*-sovereignty possessed by the states." 302 U.S. at 261-62. Nonetheless, this Court held that the Puerto Rican government was not sovereign because it "owed [its] existence" to the United States. *Id.* at 265. *Accord Heath*, 474 U.S. at 90 (reaffirming *Shell*'s double jeopardy reasoning); *Wheeler*, 435 U.S. at 318, 319 n.13 (same); *Waller*, 397 U.S. at 393 (same).

The 1950-1952 legislation did not alter that reality. In 1950, Congress enacted new legislation that delegated authority to the Puerto Rican people to draft a constitution, which would in turn provide for the

election of government officials, who would in turn govern the territory. But this additional layer of delegation—*i.e.*, the grant of authority to adopt a constitution—is still a delegation, and the source of the delegated authority is still the federal government.

Petitioner notes that many territories adopted constitutions when they were admitted to the Union as sovereign states. Pet. Br. 44. But as explained above, when states are admitted to the Union, they do not become sovereign by virtue of their state constitutions; they become sovereign because they acquire the protections and attributes of sovereignty that the Federal Constitution affords to "states." By contrast, Puerto Rico enjoys no such constitutional status. Thus, Petitioner is left to argue that, lacking such recognition under the Federal Constitution, the Puerto Rican Constitution in and of itself is sufficient to confer sovereignty. This is simply wrong. There is no principled reason why *one* layer of delegation—to elect a territorial legislature to enact laws—does not confer sovereignty, but *two* layers of delegation—to enact a constitution that authorizes a territorial legislature to enact laws—yields a sovereign entity.

The appropriate analogy for the Puerto Rican Constitution is not a state constitution, but a municipal charter. In *Waller*, the Court stated that "the apt analogy to the relationship between municipal and state governments is to be found in the relationship between the government of a Territory and the Government of the United States," 397 U.S. at 393, and the analogy is particularly apt in the context of the Puerto Rican Constitution. Many states have adopted "home rule"

provisions that authorize municipal governments to adopt or amend local charters. *See, e.g.*, Cal. Const. art. XI, §§ 5, 7; Colo. Const. art. XX, § 6; Ohio Const. art. XVIII, §§ 3, 7. Under those delegations, the people set the terms of their own governance and, in turn, elect mayors, city councilors, and municipal judges, who operate without interference by state governments. *See* David J. Barron, *Reclaiming Home Rule*, 116 Harv. L. Rev. 2255, 2290 (2003) ("After home rule, many local governments, particularly large ones, could adopt charters that set forth their own powers and enabled them to appoint their own officers.").

The adoption of a municipal charter thus has the same effect as the adoption of the Puerto Rico Constitution: "to invest the governing authorities of the municipality—either a majority of the voters, or such officers as are prescribed—with the power of local government over the inhabitants of that district." 2A Eugene McQuillin, *The Law of Municipal Corporations* § 9.2, Westlaw (3d ed., database updated July 2015). Because the authority to enact those charters derives from the states, however, the municipalities are not separate sovereigns. *Wheeler*, 435 U.S. at 319; McQuillin, *supra*, at § 9.9. Likewise, because the authority to enact the Puerto Rican Constitution derives from Congress, Puerto Rico is not sovereign.

The post-1952 case law addressing Puerto Rico cited by Petitioner does not support a contrary conclusion. Petitioner relies on *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974), and *Examining Board of Engineers, Architects and Surveyors v. Flores de Otero*, 426 U.S. 572 (1976), as confirmation that Puerto

Rico is a separate sovereign. Pet. Br. 35-37. But those cases hold only that—as a matter of statutory interpretation—the word "state" encompasses Puerto Rico in certain circumstances. *See Calero-Toledo*, 416 U.S. at 675; *Flores de Otero*, 426 U.S. at 594-95. In other circumstances, however, the Court has made clear that the word "State" does not encompass Puerto Rico. *See Fornaris v. Ridge Tool Co.*, 400 U.S. 41, 42 n.1 (1970) (explaining that "a Puerto Rican statute is not a 'State statute' within [the meaning of 28 U.S.C.] s 1254(2)"). Thus, whether Puerto Rico may be considered a "State" for purposes of a federal statute depends on the statutory context. These cases do not establish Puerto Rico's sovereignty.

Petitioner further cites *Rodríguez v. Popular Democratic Party*, 457 U.S. 1 (1982). Pet. Br. 37. But there, the Court simply upheld a particular mechanism for filling legislative vacancies against a constitutional challenge. Although the Court used the word "sovereign" in passing, 457 U.S. at 8, at no point did it purport to overrule its repeated and unqualified statements that territories are not separate sovereigns.

At most, these cases hold that Puerto Rico shares many attributes in common with the states, even though it is not, in fact, a state. We do not dispute this point. It is fully consonant with our position that Puerto Rico shares many attributes in common with sovereigns, but is not, in fact, sovereign.

B. Congress's Ability To Amend or Repeal The 1950-1952 Legislation Confirms That The Federal Government Remains The Ultimate Source Of Puerto Rico's Power.

Further underscoring the fact that the 1950 and 1952 enactments did not confer sovereignty is that those enactments are ordinary acts of Congress, which can be amended or repealed. As we have noted, the Tenth Amendment guards against undue interference with the operations of state governments. *Supra* at 16-17. But the Constitution imposes no such limitations on congressional power over territorial governments. Congress may therefore amend or repeal its 1950-1952 legislation at any time. If Congress forbears from doing so, that is simply a discretionary decision that does not alter its ultimate power over Puerto Rico.

Congress's power to amend or repeal its 1950-1952 legislation derives from a basic constitutional principle: one Congress cannot bind a subsequent Congress. *See Fletcher v. Peck*, 10 U.S. 87, 138-39 (1810). Applying that principle, the Court has specifically held that delegations of power from one Congress to a territory are subject to revocation by a subsequent Congress. *United States v. Sharpnack*, 355 U.S. 286, 296 (1958); *District of Columbia v. John R. Thompson Co.*, 346 U.S. 100, 106, 109 (1953). Significantly, for decades, the Executive Branch has taken the identical view: the 1950 and 1952 statutes are Acts of Congress which may be amended. *See* Report by the President's Task Force on Puerto Rico's Status 26 (Mar.,2011); Report by the

President's Task Force on Puerto Rico's Status 5-6 & apps. E-G (Dec. 2007).[5]

Petitioner resists this proposition, contending that the 1950-1952 legislation is immune from amendment. But Petitioner confines its legal argument to a footnote, Pet. Br. 42 n.5, and the authorities cited in that footnote are entirely inapposite. For instance, Petitioner cites case law establishing that the United States can enter into binding government contracts, such as savings bonds. *See Perry v. United States*, 294 U.S. 330, 353 (1935). But the 1950-1952 legislation is not a savings bond; it is an exercise of sovereign power which cannot be contracted away. *See Stone v. Mississippi*, 101 U.S. 814, 817-18 (1879). Petitioner also offers the example of legislation conferring independence on the Philippines. But Congress *could* repeal that legislation; it would simply have no practical effect because, unlike Puerto Rico, Congress explicitly approved the relinquishment of *United States* sovereignty over the Philippines, and the American flag no longer flies over the Philippines. Finally, Petitioner cites *Downes v. Bidwell* for the proposition that fundamental provisions of the Bill of Rights apply in Puerto Rico; yet Petitioner advances no

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[5] An OLC opinion from 1963 states that Congress could constitutionally enact a "pending proposal" to enter into a binding compact with Puerto Rico, although it does not address the legal consequences of the 1950-1952 legislation. *See* Memorandum, Power of the United States to conclude with the Commonwealth of Puerto Rico a compact which could be modified only by mutual consent (July 23, 1963), http://www.justice.gov/olc/file/796061/download. That opinion was issued before *Waller* and *Wheeler*, however, and the Executive Branch no longer adheres to the views within.

argument that amending or repealing the 1950-1952 legislation would violate the Bill of Rights. Petitioner identifies no remotely analogous context in which a statute was held immune from amendment or repeal.

Petitioner also relies on statutory language characterizing Public Law 600, which authorized the constitutional convention, as being "in the nature of a compact." Pet. App. 353a; *see* Pet. Br. 42 n.5. But Congress described the legislation this way because unlike a typical Act of Congress, Public Law 600 would be inoperative until it was "submitted to the qualified voters of Puerto Rico for acceptance or rejection." Pet. App. 353a; *see* S. Rep. 81-1779, at 2 (1950) ("The measure is in the nature of a compact, with specific provision made for an island-wide referendum in which the Puerto Ricans will be free to express their will for acceptance or rejection of the proposal."). The point was that Congress would not unilaterally foist the constitution-making process on the Puerto Rican people if they did not want it (and, as the referendum revealed, many nationalists did not); rather, the process would continue only if there was a mutual agreement to proceed. *See Puerto Rico Constitution: Hearing Before a Subcomm. of the S. Comm. on Interior and Insular Affairs on S. 3336*, 81st Cong. 4 (May 17, 1950) (statement of Resident Commissioner Antonio Fernós-Isern) (explaining that "Puerto Rico is called upon to express its approval and consent to such conditions [i.e., those in the bill]," and "[t]hat is why S. 3336 would have the nature of a compact"). But Congress's desire to cooperate with the Puerto Rican people in 1950 does not establish an intent to prevent future Congresses

from exercising their own judgment on Puerto Rico's political status.

The legislative history confirms that Congress did not intend to enact legislation that would be immune from amendment or repeal. The House and Senate Reports stated that Public Law 600 "in no way precludes future determination by future Congresses of the political status of Puerto Rico." S. Rep. 81-1779, at 4; *see* H.R. Rep. 81-2275, at 3 (1950). At the 1952 Senate hearings, Chairman O'Mahoney reiterated the "fundamental" view "that the Constitution of the United States gives the Congress complete control and nothing in the Puerto Rican constitution could affect or amend or alter that right." *Approving Puerto Rican Constitution: Hearings Before the S. Comm. on Interior and Insular Affairs on S.J. Res. 151*, 82d Cong. 40 (May 6, 1952). The Chief Counsel for the Interior Department's Office of Territories, too, reassured concerned senators that the new legislation could not disturb "the basic power inherent in the Congress of the United States ... to annul any law in any of our Territories." *Id.* at 43-44 (statement of Irwin Silverman). And Members of the House likewise understood that in accepting the Puerto Rico Constitution, Congress would not "in any way make an irrevocable delegation of its constitutional authority." 98 Cong. Rec. 6170 (1952) (statement of Rep. Meader).

In any event, if the existence of magic words in legislation could make it immune from repeal, the principle that a Congress cannot bind future Congresses would be rendered meaningless. Indeed, given that a treaty with an *actual* sovereign, enacted

under the constitutionally-recognized process of Article II, § 2, can always be repealed by an Act of Congress, *Breard v. Greene*, 523 U.S. 371, 376 (1998), it is difficult to understand how merely uttering the word "compact" in legislation related to a federal *territory* could immunize such legislation from repeal.

Yet there is no need to speculate regarding Congress's ability to amend the 1950-1952 legislation; one can just look to history. Public Law 600 states that, except for certain provisions that were repealed, the Jones Act would "continue[] in force and effect" and thereafter be known as the "Puerto Rican Federal Relations Act." Pet. App. 354a. Over the years, however, Congress has amended various provisions of the Federal Relations Act without seeking Puerto Rico's consent. *See, e.g.*, Pub. L. 89-571, 80 Stat. 764 (1966) (providing life tenure for judges); Pub. L. 91-272, § 13, 84 Stat. 294, 298 (1970) (altering diversity jurisdiction). These changes sit uncomfortably with Petitioner's portrayal of Public Law 600 as a statute requiring Puerto Rico's consent to be altered.

The most practically consequential breach of the purported compact, however, relates to a different provision of the Jones Act, which, under Public Law 600, "continued in force and effect": Section 9. That section directed "all taxes collected under the internal-revenue laws of the United States on articles produced in Porto Rico and transported to the United States, or consumed on the island ... into the treasury of Porto Rico." JA98. The practical effect of Section 9 was to direct all excise taxes on Puerto Rican rum, a major Puerto Rican export, to the Puerto Rican treasury.

Puerto Rico has received billions of dollars in rum excise taxes, and that revenue is critical to Puerto Rico's financial health. *See* Steven Maguire & Jennifer Teefy, Cong. Research Serv., R41028, *The Rum Excise Tax Cover-Over* 4 (2010).

Of all the provisions in Public Law 600 and the Federal Relations Act, Section 9 is the only one in which Congress committed to direct funds to Puerto Rico; as such, its subsequent history serves as an excellent test of whether Congress viewed Public Law 600 as a binding commitment. And Congress did not. In 1984, Congress decided no longer to adhere to its obligation under the Federal Relations Act to remit "all taxes" to Puerto Rico by capping the amount remitted at $10.50 per gallon. 26 U.S.C. § 7652(f)(1). Congress has prospectively eliminated this cap on a year-by-year basis in a series of appropriation bills dating back to 1999, but as of this writing, the cap is back in force. *Id.* Puerto Rico's entitlement to rights conferred in Public Law 600—the very enactment that authorized Puerto Rico to adopt its constitution—is thus at the mercy of the congressional appropriations process. Congress's power to modify the 1950-1952 legislation as it sees fit—both in theory and in practice—confirms that the ultimate source of power in Puerto Rico remains the federal government.

C. The Provisions Of The Puerto Rico Constitution Cited By Petitioner Do Not Establish Puerto Rico's Sovereignty.

Contrary to Petitioner's contention, no language in the Puerto Rican Constitution establishes Puerto

Rico's sovereignty. Petitioner contends that the use of language such as "[w]e, the people" establishes that Puerto Rico's authority derives from the Puerto Rican people. Pet. Br. 29 (quoting P.R. Const. pmbl.). But a reference to "the people" cannot by itself establish sovereignty, as evidenced by the fact that both the Foraker and Jones Act similarly stated that criminal prosecutions would be initiated in the name of the "people of P[uer]to Rico," JA75, 98-99. Petitioner characterizes the Puerto Rico Constitution's language as "redolent" of the U.S. Constitution, Pet. Br. 29, but the United States is sovereign because it won the Revolutionary War, not because its Constitution says "we the people." Indeed, similar language appears in innumerable municipal charters across the country. *See, e.g.*, Pensacola, Fla., Charter, pmbl. ("We the people of the City of Pensacola ... in order to secure the benefits of local self-government ... do hereby adopt this charter and confer upon the City the following powers ... ."); Whitefish, Mont., Charter, pmbl. ("We, the people of the city of Whitefish, Montana ... in order to ... provide for local self-determination, do hereby adopt this charter."); Placentia, Ca., Charter, pmbl. ("We, the people of the City of Placentia ... do ordain and establish this Charter as the organic law of said City ... "). Those terms may accurately reflect the democratic processes through which the municipal charters were adopted, but they do not change the fact that ultimate authority lies with the states, which conferred the power to adopt those charters. The same is true of Puerto Rico.

Petitioner further emphasizes that the Puerto Rico Constitution creates the legislative, judicial, and executive branches of the territorial government. Pet. Br. 30; *id.* at 32 (relying on Puerto Rico's "republican form of government"). Again, however, municipal charters often similarly authorize a mayor, city councilors, and municipal judges. The people of Denver, for example, elect their own mayor and city council members; the mayor appoints judges to the County Court; and the County Court has jurisdiction over all cases arising under Denver's charter or ordinances. Denver, Colo., Code of Ordinances, tit. I, subtit. B, §§ 4.1.4, 4.2.6. Yet the existence of the Denver charter does not establish Denver's sovereignty.

Moreover, the tripartite government established in the Puerto Rican Constitution is closely similar to the government that pre-dated that constitution. For example, the Constitution sets forth ground rules for the election of a governor and members of the Puerto Rican legislature, but these closely resemble the procedures already established by Congress in the Jones Act, as amended by the Elective Governor Act, Pub. L. 80-362, 61 Stat. 770 (1947). Existing law provided for gubernatorial elections every four years, with a residency requirement and a minimum age of thirty; the Constitution lengthened the residency requirement and increased the minimum age to thirty-five. *Compare id.* § 1, 61 Stat. 770-71, *with* P.R. Const. art. IV, §§ 1-3. Existing law provided for seven Senate districts and thirty-five House districts; the Constitution provided for eight and forty, respectively.

Compare Jones Act § 28 (JA109), *with* P.R. Const. art. III, § 3. The enactment of the Puerto Rican Constitution codifying a government with substantial similarities to the pre-existing government structure is not a conferral of sovereignty.[6]

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[6] Petitioner suggests in passing that it may be unconstitutional for Congress to delegate federal power to Puerto Rican officials without retaining direct control over their activities, and contends that those Puerto Rican officials must therefore be exercising sovereign power. Pet. Br. 30. That argument lacks merit. Congress's broad power under Article IV to "make all needful Rules and Regulations respecting the Territor[ies]" encompasses the power to delegate authority to territorial officials who do not operate under the federal government's direct supervision. Indeed, Congress has done just that in other territories that Petitioner concedes are not sovereign. For instance, Guam and the Virgin Islands elect their governors and operate their own territorial criminal justice systems without meaningful federal supervision, 48 U.S.C. §§ 1422, 1591, yet Petitioner acknowledges that those are not sovereign entities. Pet. Br. 38-39 n.4. The mayor of D.C. is neither appointed nor supervised by the President, yet Petitioner concedes that D.C. is not sovereign. *Id.* Moreover, even before the 1950-1952 legislation, Puerto Rico elected its governor and both branches of its territorial legislature, yet Petitioner acknowledges that Puerto Rico was not sovereign at that time and identifies no constitutional problem with that regime. Indeed, in *Shell*, decided only two years after the Court invalidated federal regulations under the non-delegation doctrine in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), the Court acknowledged that Congress had granted quasi-sovereign powers to the Puerto Rican legislature, but no member of the Court suggested that this might pose a non-delegation problem. We are aware of no authority holding that the creation of territorial governments might violate the Appointments Clause or other separation-of-powers doctrines.

Petitioner notes that Puerto Rican laws are no longer subject to congressional veto. Pet. Br. 30. Given the plenary power Congress still holds over Puerto Rico, however, it could preempt any Puerto Rican legislation at any time. Thus, Congress has not given up any power it previously held. Further, in the 52 years during which the Foraker and Jones Acts were in force, there are no recorded cases of Congress annulling a law enacted by the Puerto Rican legislature, despite its statutory power to do so. In both theoretical and practical terms, then, Puerto Rico's legislature exercised an identical degree of power before the adoption of its constitution as it does now. We do not dispute the symbolic significance of the removal of the congressional veto, but it does not show that Puerto Rico is now sovereign.

D. Contemporaneous Evidence Confirms That The 1950-1952 Legislation Did Not Confer Sovereignty On Puerto Rico.

Petitioner contends that Respondents' position would "'impute to the Congress the perpetration of ... a monumental hoax.'" Pet. Br. 2 (quoting *Figueroa v. People of Puerto Rico*, 232 F.2d 615, 620 (1st Cir. 1956)). To the contrary, the legislative history of the 1950-1952 legislation, and the contemporaneous statements of political leaders, reveal a consensus that the enactments would not alter Puerto Rico's fundamental political status.

The House and Senate Committee Reports on Public Law 600 both stated that the law "would not change Puerto Rico's fundamental political, social, and

economic relationship to the United States." H.R. Rep. 81-2275, at 3; S. Rep. 81-1779, at 3. They also made clear that the law in no way "preclude[s] a future determination by the Congress of Puerto Rico's ultimate political status." H.R. Rep. 81-2275, at 3; S. Rep. 81-1779, at 4; *see also* H.R. Rep. 81-2275, at 4 (stating that the law "would be a fundamental contribution to the art and practice of the government and administration of Territories *under the sovereignty of the United States*" (emphasis added)). The Secretary of the Interior, the cabinet officer responsible for the administration of Puerto Rico, similarly explained that the law would "not change Puerto Rico's political, social, and economic relationship to the United States." H.R. Rep. 81-2275, at 5.

Puerto Rico's elected representatives shared that understanding. Puerto Rico's non-voting delegate to Congress testified that the legislation "would not change the status of the island of Puerto Rico relative to the United States... It would not alter the powers of sovereignty acquired by the United States over Puerto Rico under the terms of the Treaty of Paris." *Hearing Before a Subcomm. of the Comm. on Interior and Insular Affairs*, 81st Cong. 4 (May 17, 1950) (statement of Hon. Antonio Fernós-Isern).

The popularly elected governor of Puerto Rico, Luis Muñoz Marín, likewise confirmed that "Congress [could] always get around and legislate again" if Puerto Rico did not fare well under its own constitution. *Puerto Rico Constitution: Hearings Before the Comm.*

on Public Lands on H.R. 7674 and S. 3336, 81st Cong. 33 (Mar. 14, 1950).[7]

There is simply no evidence that anyone in 1952 thought that Puerto Rico had become America's first sovereign territory. The Court should refrain from issuing a declaration that departs so dramatically from the consensus of the elected officials involved in the decision at issue.

E. The Factual Predicates of Petitioner's Argument Are Historically Inaccurate.

Thus far we have assumed the truth of the two key factual premises of Petitioner's argument: that the Puerto Rican people enacted "their own Constitution," and that under that Constitution, the federal government does not "interfere with the Commonwealth's internal governance." Pet. Br. 29-30. We have argued that these premises, even if true, do not establish Puerto Rico's sovereignty.

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[7] Petitioner cites the United States' letter to the United Nations as evidence of Puerto Rico's sovereignty. Pet. Br. 37. Yet that letter does not characterize Puerto Rico as a sovereign; it states that Puerto Rico presently is a self-governing entity, a statement entirely consistent with the position that the power to exercise such self-government is delegated by the United States. Indeed, for decades, the Executive Branch has simultaneously held the position that Puerto Rico is self-governing, and that the legislation delegating Puerto Rico the power to exercise such self-government can be amended by Congress. *See supra* 27-28. In any event, a letter from the State Department to the U.N. sheds little light on whether the Constitution permits the creation of a sovereign territory.

In fact, however, both of those premises are false. First, the Puerto Rican Constitution cannot genuinely be characterized as Puerto Ricans' "*own* constitution," as the version of the constitution adopted by Puerto Ricans was substantially amended by Congress. Further, even under that Constitution, the federal government continues to interfere with Puerto Rico's internal governance. These two facts provide additional confirmation that the 1950-1952 legislation did not confer sovereignty on Puerto Rico.

1. Congress's changes to the constitution approved by the Puerto Rican people confirm that Puerto Rico is not sovereign.

Petitioner's assertion that Puerto Ricans "enacted and approved their own Constitution," Pet. Br. 29, is an incomplete description of the events of 1950-1952. In fact, Congress barred Puerto Rico from enacting a constitutional provision that its people had approved—an exercise of federal control that would have been plainly unconstitutional with respect to the states.

In *Coyle v. Smith*, 221 U.S. 559 (1911), this Court explained the limits of Congress's control over a new state that enters the Union. In short, Congress may impose entrance conditions of its choosing, but once a state joins the Union, Congress cannot constrain the state's exercise of its sovereign powers without an independent constitutional basis for doing so. *See id.* at 568. Put another way, Congress cannot use its leverage over new states to impose enduring restrictions that it could not have imposed on existing states. Applying

that principle, the Court invalidated a statute that barred Oklahoma from moving its capital after it joined the Union. *Id.* at 574.

The *Coyle* doctrine does not apply to territories, however, and Congress may therefore demand permanent changes to a territorial constitution that would be unconstitutional infringements on state sovereignty. The events giving rise to the Puerto Rico Constitution illustrate this point.

The Puerto Rican people approved their draft constitution by referendum in March 1952. *See* H.R. Rep. 82-1832, at 3-5. Although much of the proposed constitution was similar to the constitutions of the states, *see* José Trías Monge, *Puerto Rico: The Trials of the Oldest Colony in the World* 114 (1997), the proposed constitution broke new ground in one significant respect. Section 20 of the Bill of Rights, modeled on the Universal Declaration of Human Rights, recognized a panoply of "human rights." *See infra* App'x.[8] These included rights "to obtain work," "to food, clothing, housing and medical care and necessary social services," to "social protection in the event of unemployment, sickness, old age or disability," and to "special care and assistance" for "motherhood and childhood." *Id.* Section 20 further committed the government to "assure the fairest distribution of economic output, and to obtain the maximum understanding between individual initiative and collective cooperation," and directed that all relevant laws be construed so as to further these aims. *Id.*

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[8] The full text of Section 20 is in an appendix to this brief.

After the constitution was approved by the Puerto Rican people, it was transmitted to the President and to Congress for their review. Numerous members of Congress expressed disagreement with Section 20, *see* 98 Cong. Rec. 6171-75, 7847 (1952), and Congress ultimately opted to cut Section 20 from the approved version of the constitution. Pet. App. 356a. In addition, recognizing that the Puerto Rican people would likely re-enact the provision if they could, *see* 98 Cong. Rec. at 7844, Congress also required them to enact a separate constitutional amendment barring themselves from reintroducing Section 20 later through the constitutional amendment process. Specifically, this mandatory amendment prohibited Puerto Rico from ever adopting any amendment inconsistent with Congress's original resolution of approval (which disapproved Section 20), or with Public Law 600 or the Federal Relations Act.[9] Congress also required Puerto Rico to amend its Constitution with pre-approved language that affirmed students' freedom to choose private elementary schools. Pet. App. 356a.

Petitioner asserts that Congress required its amendments to be approved "by the people of Puerto Rico," Pet. Br. 35, but that is incorrect. Under the resolution approving the Puerto Rican Constitution, the constitution's original provisions regarding public education and the amendment process would "have no force and effect" until the people of Puerto Rico used

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[9] Puerto Rico could not amend its Constitution to remove this provision; any such amendment would be preempted by the same 1952 resolution. In any event, Puerto Rico has never tried.

their new constitutional amendment procedures, including a popular referendum, to incorporate Congress's chosen language. Pet. App. 356a. As such, the Puerto Rican people ultimately voted on, and ratified, those two changes—albeit as conditions of rendering their new constitution fully operative. *See Proclamation: Amendments to the Constitution of the Commonwealth of Puerto Rico*, Jan. 29, 1953, P.R. Laws Ann. Hist. § 11. By contrast, Puerto Ricans never had any opportunity to vote on the deletion of Section 20, which Congress simply refused to approve. Pet. App. 356a.

Petitioner attempts to explain this history away by describing the deletion of Section 20 as a "minor" change. Pet. Br. 18. But the decision of whether to constitutionalize a catalog of positive rights—and to direct the judiciary to adopt a sweeping rule of construction favoring them—is not a "minor" point. *Cf. DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 196 (1989) (explaining that "[t]he Framers were content to leave the extent of governmental obligation" with respect to such rights "to the democratic political processes"). Certainly Congress did not view it that way at the time. To the contrary, Congress made a significant and unilateral change to the Constitution adopted by the Puerto Rican people based on its policy disagreement with that document. We do not mean to denigrate the historic process underlying the drafting of the Puerto Rican Constitution, of which many Puerto Ricans are rightfully proud. But the fact that the Puerto Rican Constitution was unilaterally revised by Congress to

remove Section 20, and then put into effect without after-the-fact ratification by the Puerto Rican people, is irreconcilable with Petitioner's suggestion that the Puerto Rican Constitution established Puerto Rico's sovereignty.

Significantly, if Puerto Rico had been a state, the changes to its Constitution would have been unconstitutional under *Coyle*. Although this Court's cases have on some occasions endorsed an expansive vision of federal power, it is difficult to imagine the Court upholding federal legislation preempting the enactment of a right to education or healthcare in state constitutions. Thus, Congress's freedom to impose such a restriction on Puerto Rico reflects the absence of Puerto Rican sovereignty.

Petitioner relies on the fact that Congress has sometimes imposed conditions on states seeking to enter the Union. But it misunderstands the legal significance of those conditions. As the Court made clear in *Coyle*, Congress is perfectly free to condition the entry of a state on its making changes to its constitution; but it cannot regulate what the state does with its constitution after it becomes a state, unless such regulation falls within Congress's enumerated powers. Arizona, one of Petitioner's examples, Pet. Br. 34-35, illustrates this point perfectly. When Arizona sought to enter the Union, its proposed constitution authorized citizens to recall any public official, including judges. President Taft insisted that Arizona's admission be conditioned on its adopting an amendment to exclude judges from the recall provision. H.R. Doc. No. 62-106, at 9 (Aug. 15, 1911). Taft conceded,

however, that because "the people of Arizona are to become an independent State," they would inevitably be free to "reincorporate [the provision] in their constitution after statehood." *Id.* Congress imposed the requested condition; the people of Arizona obliged by adopting the necessary amendment; and Arizona was admitted as a state on February 14, 1912. *See* Proclamation, 37 Stat. 1728 (1912). As expected, the Arizona Legislature promptly proposed an amendment that would restore the original recall provision. The people of Arizona adopted that amendment in November 1912, and it remains in force today. *See* Ariz. Const. art. 8, pt. 1, § 1. There was nothing the federal government could do: as *Coyle* makes clear, once a state attains sovereignty, Congress's leverage ends.[10]

By contrast, federal law prohibits Puerto Rico from ever making a change to its Constitution inconsistent with the 1952 legislation, and Congress forced Puerto Rico to amend its Constitution to achieve the same result. It is this continuing exercise of power over Puerto Rico that distinguishes it from the states and confirms that it is not sovereign.

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[10] Petitioner also asserts that "Congress required the adoption" of an amendment when it approved the New Mexico constitution in 1911. Pet. Br. 35. That is wrong. In the statute cited by Petitioner, Congress required New Mexico to put a new Article XIX *to a vote*, but explicitly stated that if the vote failed, "Article XIX of the constitution of New Mexico as adopted [previously] shall remain a part of said constitution." 37 Stat. 39, 42 (1911). New Mexico did ultimately adopt the new Article XIX, but substantially revised it in 1996. *See Governing New Mexico* 40-41 (F.C. Garcia et al. eds., 2006).

2. Congress's post-1952 limitations on Puerto Rican self-government demonstrate that Puerto Rico is not sovereign.

The federal government's post-1952 limitations on Puerto Rican self-government went well beyond the permanent bar on re-enacting Section 20. Even after 1952, the federal government has continued to exercise authority over Puerto Rico's government in numerous respects, each of which would have been unconstitutional if applied to a state.

For instance, Public Law 600 left intact restrictions on Puerto Rico's ability to exercise the basic sovereign powers of imposing taxes and borrowing money. In particular, Public Law 600 left in force Section 3 of the Jones Act, which included a provision—still in force today—banning Puerto Rico from taxing its own municipal bonds. Pet. App. 354a; Pub. L. 75-391, 50 Stat. 843, 844 (1937). It also left in force a different portion of Section 3, which limited Puerto Rico's ability to issue sovereign debt. *See* 50 Stat. at 844 (providing that Puerto Rico and certain of its municipalities could not take on debt exceeding 10% of their property value, and other municipalities could not take on debt exceeding 5% of their property value). Congress ultimately repealed that provision in 1961, but only on the condition that Puerto Rico amend its own Constitution to limit its debt. Pub. L. 87-121, 75 Stat. 245 (1961). These restrictions on fundamental powers like taxing and borrowing—which have no analog in any state—belie Petitioner's assertions that Puerto Rico's Constitution established its sovereignty.

The 1950-1952 legislation also preserved federal control over Puerto Rico's judiciary exceeding such control in any state. For instance, Public Law 600 preserved Section 10 of the Jones Act, which provides that "all judicial process shall run in the name of 'United States of America, ss [*scilicet*], the President of the United States,'" a provision that survives today. Pet. App. 354a; JA98-99; 48 U.S.C. § 874. Moreover, even after 1952, criminal defendants had the right to appeal federal issues from the Puerto Rico Supreme Court to the First Circuit, and in civil cases, the First Circuit had jurisdiction to review the Puerto Rico Supreme Court's application of territorial law. *See Figueroa*, 232 F.2d at 618. By contrast, state courts have the final say on issues of state law, and only the Supreme Court can reverse their judgments on issues of federal law. Although Congress repealed these provisions several years later, the subordination of the Puerto Rico Supreme Court to the First Circuit is inconsistent with Petitioner's view that the 1950-1952 legislation conferred sovereignty on Puerto Rico.

Nor has the adoption of Puerto Rico's Constitution inhibited Congress from enacting new legislation that would be unconstitutional as applied to the states. For instance, after this Court held that Congress could not require state governments to grant religious exemptions under the Religious Freedom Restoration Act, *see City of Boerne v. Flores*, 521 U.S. 507 (1997), Congress enacted a new version of RFRA that explicitly applied this requirement to Puerto Rico and other federal territories. *See* 42 U.S.C. § 2000bb-2(2).

These enduring mechanisms of federal oversight refute Petitioner's contention that the 1950-1952 legislation conferred sovereignty on Puerto Rico, or even that it sought to do so. To be sure, in many respects, Puerto Rico is treated similarly to states today. But Puerto Rico is not like a state in all respects, and it is those differences—where Congress chooses to legislate in Puerto Rico in a manner that would be unconstitutional as applied to the states—that establish that the federal government remains the ultimate source of the power delegated to Puerto Rico.

III. PUERTO RICO IS NOT COMPARABLE TO INDIAN TRIBES.

Recognizing the fundamental differences between states and territories under the Constitution, Petitioner attempts to analogize Puerto Rico to Indian tribes, Pet. Br. 40-43, which this Court has characterized as separate sovereigns for double jeopardy purposes. Petitioner's analogy is without merit.

Indian tribes are not "territories" under the Constitution. To the contrary, the Constitution characterizes Indian tribes as distinct political entities analogous to foreign nations and states, *see* U.S. Const. art. I, § 8, cl. 3 (authorizing Congress "[t]o regulate commerce with foreign nations, and among the several states, and with the Indian tribes"), and excludes "Indians not taxed" from the American polity for apportionment purposes. *Id.* § 2, cl. 3.

The unique constitutional status of Indian tribes was the basis for this Court's decision in *Wheeler*,

which established that Indians are separate sovereigns for double jeopardy purposes. As the Court explained, "[b]efore the coming of the Europeans, the tribes were self-governing sovereign political communities." 435 U.S. at 322-23. Tribes have been divested of "some aspects of the sovereignty which they had previously exercised," but "the Indian tribes have not given up their full sovereignty." *Id.* at 323. Thus, the theory behind *Wheeler* was that the tribes *already had* sovereignty when the Union was founded, and that a portion of that sovereignty still remains.

This argument does not apply to Puerto Rico. Puerto Rico was not a sovereign entity that predated the Constitution; to the contrary, prior to the United States' acquisition of Puerto Rico, it was a colony subject to the complete power of the Spanish king and Cortes (Spain's equivalent of Congress). *See* Trías Monge, *supra*, at 9-13. Because Puerto Rico has always been subject to the plenary authority of another nation, there is no inherent or retained Puerto Rican sovereignty that Congress could recognize and preserve.

Confirming the point, *Wheeler*—which post-dated the Puerto Rican Constitution by over 25 years—made clear that territories, unlike tribes, are *not* sovereign for double jeopardy purposes. The Court stated: "When a territorial government enacts and enforces criminal laws to govern its inhabitants, it is not acting as an independent political community like a State," but as "'an agency of the federal government.'" 435 U.S. at 321. Thus, "Territory and Nation ... are not two separate sovereigns ... but one alone." *Id.* This is

because "a territorial government is entirely the creation of Congress, 'and its judicial tribunals exert all their powers by authority of the United States.'" *Id.* (quoting *Grafton*, 206 U.S. at 354). Tribes, by contrast, are separate sovereigns because they originated before the federal government and "retain their existing sovereign powers." *Id.* at 323. Petitioner cites *Wheeler* eight times in its brief—but never once acknowledges *Wheeler*'s repeated rejection of the exact argument that Petitioner now advances.[11]

Moreover, *Wheeler* explicitly rejected the argument that drafting a constitution could create sovereignty. The Court stated that Congress had enacted statutes that had "authorized the Tribe to adopt a constitution for self-government," yet "none of these laws *created* the Indians' power to govern themselves and their right to punish crimes committed by tribal offenders." *Id.* at 327-28. Rather, the Indians "already had such power under existing law." *Id.* at 328 (internal quotation marks omitted). This refutes Petitioner's argument that Congress's authorization of a Puerto Rican constitution could transform Puerto Rico into a sovereign.

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[11] There is no chance that the *Wheeler* Court somehow forgot about Puerto Rico when making these unqualified statements. *Wheeler* repeatedly cited *Shell* and reaffirmed that the double-jeopardy analysis did not turn on the fact that "Congress had given Puerto Rico 'an autonomy similar to that of the states.'" *Id.* at 319 n.13. Further, *Wheeler* was released less than four weeks after *Califano v. Torres*, 435 U.S. 1 (1978), which upheld a federal statute discriminating against Puerto Rico for federal benefits purposes.

Petitioner also relies on *United States v. Lara*, 541 U.S. 193 (2004), in which the Court held that a tribe is a separate sovereign when prosecuting Indians from other tribes, even though the Court had previously held that tribes lacked this power, only to be overruled by Congress in the so-called "*Duro* fix." *See id.* at 197-98. According to Petitioner, *Lara* shows that Congress can "recognize[] and confirm[] the sovereignty" of any government, such as Puerto Rico. Pet. Br. 33.

Lara provides no support to Petitioner. In *Lara*, the Court concluded that when Congress authorized criminal prosecutions of Indians from other tribes, it had not *delegated* any federal power to the tribes. 541 U.S. at 199. Rather, Congress had merely *relaxed* restrictions on the pre-existing inherent sovereignty of the tribes. *Id.* The Court relied on the text of the *Duro* fix, which stated that Congress's intent was for the "inherent power of Indian tribes ... to exercise criminal jurisdiction over *all* Indians" to be "recognized and affirmed." *Id.* at 198-99 (citing 25 U.S.C. § 1301(2)). The Court further concluded that the Constitution authorized Congress "to lift the restrictions on the tribes' criminal jurisdiction." *Id.* at 200.

But Congress's ability to affirm pre-existing sovereignty does not advance Petitioner's position, because Puerto Rico never possessed any sovereignty in the first place. Thus, Petitioner effectively asks the Court to hold that the 1950-1952 legislation had the *opposite* effect from the *Duro* fix: whereas the *Duro* fix *affirmed* the tribes' pre-existing sovereign power to prosecute Indians from other tribes, Petitioner contends that the 1950-1952 legislation *altered* Puerto

Rico's status by transforming it from non-sovereign into sovereign. Nothing in *Lara* supports Petitioner's argument that Congress did, or even could, take this step in the 1950-1952 enactments.

Petitioner relies on a string-cite in *Lara* that lists "more radical adjustments to the autonomous status of other such dependent entities," including the 1950-1952 Puerto Rican legislation. From this, Petitioner draws the inference that the Court must also view Puerto Rico as sovereign. Pet. Br. 33-34. But this inference does not follow. First, it is undisputed that the 1950-1952 legislation was an adjustment in Puerto Rico's "*autonomy*"—but as Petitioner itself notes, the level of local autonomy is not relevant to the double jeopardy sovereignty analysis. *See* Pet. Br. 26-27. Second, the very same string-cite includes a First Circuit case that "describ[es] various adjustments to Puerto Rican autonomy through congressional legislation since 1898." *Lara*, 541 U.S. at 204 (citing *Cordova & Simonpietri Ins. Agency Inc. v. Chase Manhattan Bank N.A.*, 649 F.2d 36, 39-41 (1st Cir. 1981)). If Petitioner's interpretation of the Court's string-cite were correct, then each and every one of those adjustments (not just the 1950-1952 legislation) would have altered Puerto Rico's sovereign status, which of course Petitioner does not suggest.

More fundamentally, a long string-cite would be an exceedingly elliptical way for this Court to overrule its repeated prior statements that territories are not sovereign. *See supra* Part I.A. The majority opinion in *Lara* never cited *Grafton*, *Shell*, or *Waller*, and there is

no evidence whatsoever that the Court intended to revisit those cases.

At bottom, Petitioner's argument contains a basic flaw. Petitioner argues that Puerto Rico's superficial similarity to the states (*i.e.*, that it joined the United States after the Founding, and has a territorial constitution) and its superficial similarity to tribes (*i.e.*, that it is subject to Congress's plenary control) can be merged together so that Puerto Rico, too, can be considered a sovereign. But this argument ignores the fact that Puerto Rico lacks the attributes of states and tribes that *make* those entities sovereign: Puerto Rico has no sovereignty recognized by the Constitution (like a state), nor any pre-existing, inherent sovereignty (like a tribe). The analogy to both states and tribes therefore fails: Puerto Rico has no sovereignty apart from that of the United States.

IV. PETITIONER OFFERS NO CLEAR POSITION ON EITHER THE DEFINITION OF SOVEREIGNTY OR THE IMPLICATIONS OF SOVEREIGNTY.

Respondents offer the Court a clear rule. States and Indian tribes are sovereign; territories are not. And Respondents' justification for that rule is equally clear. States are sovereign because the Constitution recognizes them as such; Indian tribes are sovereign because they plainly were sovereign, under any possible definition of that term, prior to the arrival of Europeans, and have retained a portion of that sovereignty; territories are non-sovereign because they lack any of the constitutional protections or attributes of sovereignty.

By contrast, Petitioner is unable to offer a clear rule on either the distinction between sovereign and non-sovereign entities, or the legal consequences of conferring sovereignty. The ambiguities in Petitioner's position—and their troubling implications in future cases—are additional reasons to reject Petitioner's position in this case.

1. Petitioner defines sovereignty abstractly, in terms of where power "emanates." Pet. Br. 28. This is a vague concept, and Petitioner's application of this concept to Puerto Rico does not clarify matters. Petitioner cites at least seven justifications for its position that Puerto Rico is "sovereign": (a) Public Law 600 described the forthcoming relationship with Puerto Rico as "in the nature of a compact," Pet. Br. 29; (b) Puerto Rico's Constitution includes hortatory language such as "we, the people," *id.*; (c) its Constitution provides for three branches of government, *id.* at 30; (d) the federal government exercises a low degree of control over Puerto Rico's internal affairs, *id.*; (e) Congress's changes to Puerto Rico's Constitution were supposedly "minor," *id.* at 31; (f) Congress verified that Puerto Rico would have a "republican form of government," *id.* at 32; (g) the State Department characterized the results of the 1950-1952 legislation to the U.N. in a particular way, *id.* at 37. Petitioner offers no guidance on the relative importance of these factors or on how to determine "sovereignty" when any of them is absent.

Petitioner's inability to provide a clear rule on the definition of "sovereignty" is problematic for three reasons. First, sovereignty is the most basic attribute

of a political entity; it is the sort of concept for which an indeterminate, multi-factor test seems particularly inappropriate.

Second, Petitioner's multiple factors reflect incompatible conceptions of sovereignty. For instance, Petitioner relies both on language in the Puerto Rican Constitution (*e.g.*, "[w]e, the people," P.R. Const. pmbl.), and on language in Congress's enactments (*e.g.*, "in the nature of a compact," Pet. App. 353a). But a theory of sovereignty that depends on the internal intention of the Puerto Rican people, and a theory of sovereignty that depends on the external intention of Congress, are entirely different. Needless to say, internal and external intentions may not always align. For instance, suppose the Puerto Rican Constitution originally included, or was amended to include, prefatory language stating that Puerto Rico operates under authority delegated by Congress. Would this language extinguish Puerto Rico's sovereignty based on the internal views of its people, or would Puerto Rico remain sovereign based on the external intent of Congress? Petitioner offers no coherent theory of sovereignty that would answer this question.

Third, Petitioner's multi-factor test injects ambiguity into the constitutional status of other sub-national units. For example, Congress has enacted legislation authorizing the Virgin Islands "to organize a government pursuant to a constitution of their own adoption." Pub. L. 94-584, 94 Stat. 2899 (1976). In response, the Virgin Islands drafted a proposed constitution, but Congress rejected it, "urg[ing]" the Virgin Islands to convene again "for the purpose of

reconsidering and revising the proposed constitution." Pub. L. 111-194, § 1, 124 Stat. 1309, 1310 (2010). If Congress ultimately does approve the Virgin Islands' constitution, Petitioner's position gives no clear guidance on what factors must exist for the Virgin Islands to be considered sovereign—a troubling ambiguity, given that Petitioner's position has legal implications much more radical than the dual-sovereignty exception to the Double Jeopardy Clause.

Further, given this Court's explicit analogy of territories to municipalities, *Waller*, 397 U.S. at 393, a holding that Puerto Rico is "sovereign" could open the door for states to confer sovereignty on municipalities. Given the great diversity in municipal powers nationwide—and even within the same municipality over time—Petitioner's approach would lead to a flood of litigation over whether, and under what circumstances, a municipality could become sovereign.

2. In addition to Petitioner's inability to present a clear definition of sovereignty, Petitioner is unable to present a clear picture of the consequences of ascribing sovereignty to Puerto Rico.

Petitioner argues that as a result of Puerto Rico's sovereignty, the 1950-1952 legislation is immune from repeal. Pet. Br. 41-42. But Petitioner gives no indication of what this means in practice—a significant omission, because Petitioner's position has potentially dramatic consequences.

If Petitioner's position prevails, the 1950-1952 legislation would be ossified into a kind of sub-constitution, immune from repeal by Congress. (It is

even unclear whether, under Petitioner's view, the 1950-1952 legislation could be repealed through a constitutional amendment.) Thus, any subsequent congressional enactment that "violated" the 1950-1952 legislation could be struck down as inconsistent with that impossible-to-repeal legislation.

Yet Public Law 600 states that the provisions of the Puerto Rico Federal Relations Act "continue in force and effect," Pet. App. 354a; and if those provisions are immune from repeal, their breadth and vagueness could jeopardize a wide array of subsequent legislation. For instance, Section 37 of the Federal Relations Act states that "the legislative authority ... provided [to Puerto Rico] shall extend to all matters of a legislative character not locally inapplicable, including power to create, consolidate and reorganize the municipalities." JA120. One can easily imagine litigants challenging federal statutes allegedly impinging on the Puerto Rican legislature's authority to enact "locally applicable" legislation as "violating" this provision.[12] Petitioner offers no explanation of whether, or to what extent, such challenges will be permissible.

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[12] To take one prominent example: in the *Franklin* case in which this Court recently granted certiorari, Judge Torruella's concurrence argued that the federal statute at issue, if interpreted to prevent Puerto Rico from enacting local bankruptcy legislation, would be inconsistent with Section 37 of the Federal Relations Act, although—consistent with current law—he did not suggest the statute would be invalid on that ground. *Franklin Cal. Tax-Free Trust v. Puerto Rico*, 805 F.3d 322, 352-53 (1st Cir. 2015), *cert. granted*, No. 15-233 (2015).

In addition to arguing that the 1950-1952 legislation is immune from repeal, Petitioner also quotes with approval case law stating that in 1952, "Puerto Rico ceased being a territory of the United States subject to the plenary powers of Congress," Pet. Br. 42. This was the position taken by the concurring and dissenting Justices below. Pet. App. 134a-135a, 230a.

Neither Petitioner nor the dissenting opinions elaborate on the consequences of declaring that the United States' plenary powers have been abrogated; suffice it to say that they could be radical. To take but one example, Puerto Ricans are not subject to federal income tax, notwithstanding the Constitution's requirement that taxes be uniform nationwide. U.S. Const., art. I, § 8, cl. 1. The reason Puerto Rico's distinct tax regime complies with the Constitution is that Congress has the plenary authority to "to levy local taxes for local purposes within the territories." *Downes*, 182 U.S. at 292 (White, J., concurring). Of course, if the 1950-1952 legislation withdrew Congress's plenary power over Puerto Rico, this reasoning might no longer be valid. Thus, Petitioner's position could threaten the entire Puerto Rican tax regime. At a minimum, Petitioner's position that Congress's plenary powers over Puerto Rico have been reduced in an unspecified way would inject profound instability into basic aspects of Puerto Rican governance.

The indeterminate and potentially serious consequences of declaring Puerto Rico a "sovereign" counsel in favor of retaining this Court's century-old rule: states are sovereign, and territories are not.

V. THE DUAL SOVEREIGNTY EXCEPTION TO THE DOUBLE JEOPARDY CLAUSE WILL NOT CONFER "DIGNITY" ON PUERTO RICANS.

Petitioner's brief concludes with the assertion that Respondents' position "disparage[s] the dignity of the people of Puerto Rico who established the Commonwealth and its Constitution in 1952." Pet. Br. 45. That is incorrect. Respondents' position does not demean the Puerto Rican people, but in fact honors them, by providing an honest assessment of Puerto Rico's political reality.

1. First, authorizing dual prosecutions in Puerto Rico would not enhance the dignity of the Puerto Rican people. The effect of the dual-sovereignty exception to the Double Jeopardy Clause would be to authorize federal indictments of Puerto Rican citizens who commit local crimes even after territorial prosecutions have concluded, based on the federal government's disagreement with the outcome of the territorial proceedings. For instance, the Puerto Rican Constitution prohibits the death penalty. P.R. Const. art. II, § 7. Yet under the dual-sovereignty exception, the federal government may indict a Puerto Rican citizen for capital murder, even if he has already been prosecuted in territorial court for the same murder. Of course, the federal government can do this in the states as well; but unlike citizens of the states, the citizens of Puerto Rico have no political voice whatsoever in either the election of the legislators who enacted the federal death penalty, or the President that seeks to impose it. This outcome hardly enhances Puerto Ricans' dignity.

The dual-sovereignty exception would also, as a matter of federal law, authorize the reverse situation: territorial prosecutions that follow federal prosecutions. But given that the concurring opinion below argued that the dual-sovereignty exception violated the Puerto Rican Constitution, and the Justices in the majority below evidently have strongly held views that the dual-sovereignty exception should not apply in Puerto Rico, such prosecutions might well be held illegal on remand as a matter of territorial law. In any event, even if such prosecutions would be held permissible, they would be rare. As a matter of policy, the Puerto Rican government has signed a Memorandum of Understanding with the federal Department of Justice that yields "primary jurisdiction" over a wide array of serious crimes to federal officials.[13] As this case illustrates, there are cases in which territorial officials seek to prosecute defendants following a federal prosecution; but subjecting a small, seemingly random subset of Puerto Rican criminal defendants to territorial prosecution for crimes for which they have already served time in federal prison is not dignifying to Puerto Ricans.

We also note that the dual-sovereignty exception to the Double Jeopardy Clause is itself highly controversial. This Court authorized the rule in a 5-4 decision over a vigorous dissent, *Bartkus v. Illinois*, 359 U.S. 121, 150-64 (1959) (Black, J., dissenting), and numerous scholars and judges—including the

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[13] This Memorandum is available at http://laevidencia.com/files/MOU_2_feb_2010.pdf.

concurring judges below—have since argued that it is unfair and inconsistent with the original public meaning of the Constitution. Pet. App. 164a-190a; *see also, e.g.*, Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 Colum. L. Rev. 1, 6 (1995). *Bartkus*, of course, is a binding precedent that has repeatedly been applied. But it is far from clear that the Puerto Rican people would regard the expansion of that controversial precedent to the territories—thus making Puerto Rican citizens vulnerable to dual prosecutions—as a show of respect.

2. As for Petitioner's suggestion that denying Puerto Ricans' "sovereignty" disparages their dignity: this is a surprising accusation to level at the Supreme Court of Puerto Rico, whose opinion in this case was an exhaustive, scholarly examination of Puerto Rico's political status that showed no disrespect toward the Puerto Rican people.[14] It is an equally surprising allegation to level at Judge Torruella, perhaps the staunchest defender in the federal judiciary of the rights of Puerto Ricans,[15] who similarly has argued that

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[14] The decision below was certainly better-reasoned than the decision it overruled: *Pueblo v. Castro García*, 120 P.R. Dec. 740 (P.R. 1988). In *García*, the court held that the dual sovereignty exception did not apply because Puerto Rico's power to prosecute emanated *both* from Congress *and* from "the People"—a theory Petitioner does not defend. Pet. App. 31a-32a (quoting *García*, 120 P.R. Dec. at 779-81).

[15] *See, e.g.*, *Igartúa v. United States*, 626 F.3d 592, 612–39 (1st Cir. 2010) (Torruella, J., dissenting in relevant part); *Igartúa De La Rosa v. United* States, 417 F.3d 145, 158–84 (1st Cir. 2005) (Torruella, J., dissenting); Juan R. Torruella, *The Insular Cases:*

Puerto Rico is not "sovereign" for double jeopardy purposes. *See United States v. Lopez Andino*, 831 F.2d 1164, 1172–77 (1st Cir. 1987) (Torruella, J., concurring).

These distinguished jurists have argued that Puerto Rico is non-sovereign not out of disrespect for Puerto Ricans' dignity, but out of respect. Dignity requires honesty. And an honest assessment of Puerto Rico's current political status requires a recognition that Puerto Rico is not sovereign. Puerto Ricans indisputably enjoy significant autonomy, but the fact remains that they are subject to the total authority of Congress; are treated differently under federal law relative to Americans living in the states; and are disenfranchised in federal elections. *Supra* at 19-21. Declaring Puerto Rico to be sovereign for purposes of the dual-sovereignty exception to the Double Jeopardy Clause will not alter these realities. To the contrary, it would convey a deeply unappealing message to Puerto Ricans: Puerto Rico may be considered "sovereign," but only in the context where it helps the Puerto Rican people the least, and in fact strips them of a constitutional right against dual prosecutions to which they otherwise would be entitled.

* * *

As Petitioner correctly states, Pet. Br. 45, there is a lively debate in Puerto Rico today about Puerto Rico's future political status. This debate reflects dissatisfaction among many Puerto Ricans about Puerto Rico's current political situation. Reasonable

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The Establishment of A Regime of Political Apartheid, 29 U. Pa. J. Int'l L. 283, 286 (2007).

minds disagree about what Puerto Rico's future status should be, and Respondents take no position on that issue.

But any honest debate over Puerto Rico's future necessarily begins with an honest assessment of Puerto Rico's present. Puerto Rico, at present a territory, is not sovereign.

CONCLUSION

The judgment of the Puerto Rico Supreme Court should be affirmed.

Respectfully submitted,

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December 16, 2015

APPENDIX

Proposed Puerto Rican Constitution, Section 20:

The Commonwealth also recognizes the existence of the following human rights:

The right of every person to receive free elementary and secondary education.

The right of every person to obtain work.

The right of every person to a standard of living adequate for the health and well-being of himself and of his family, and especially to food, clothing, housing and medical care and necessary social services.

The right of every person to social protection in the event of unemployment, sickness, old age or disability.

The right of motherhood and childhood to special care and assistance.

The rights set forth in this section are closely connected with the progressive development of the economy of the Commonwealth and require, for their full effectiveness, sufficient resources and an agricultural and industrial development not yet attained by the Puerto Rican community.

In the light of their duty to achieve the full liberty of the citizen, the people and the government of Puerto Rico shall do everything in their power to promote the greatest possible expansion of the system of production, to assure the fairest distribution of economic output, and to obtain the maximum understanding between individual initiative and collective cooperation. The executive and judicial branches shall bear in mind this duty and shall construe the laws that tend to fulfill it in the most favorable manner possible.

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Supreme Court of the United States

THE COMMONWEALTH OF PUERTO RICO,

Petitioner,

v.

LUIS M. SÁNCHEZ VALLE AND
JAIME GÓMEZ VÁZQUEZ,

Respondents.

On Writ of Certiorari to the Supreme Court of Puerto Rico

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INTRODUCTION

Respondents' position boils down to the mantra that "States are sovereign, but Territories are not." Whatever the merits of that proposition as a matter of political philosophy, it has no bearing here. In the double jeopardy context, as this Court has long explained, two offenses are not the "same" if they are created by "entities [that] draw their authority to punish the offender from distinct sources of power." *Heath v. Alabama*, 474 U.S. 82, 88 (1985) (citing, *inter alia*, *United States v. Wheeler*, 435 U.S. 313, 320 (1978)); *see also United States v. Lara*, 541 U.S. 193, 199 (2004).

That principle controls here. The criminal laws of the Commonwealth of Puerto Rico emanate from authority delegated by the people of Puerto Rico through their own Constitution. Respondents and their *amici* dispute that point, asserting that the Puerto Rico Constitution itself emanates from delegated federal authority. But even cursory examination of the key legal documents from the 1950-52 era—including the federal statute that proposed a "compact" whereby "the people of Puerto Rico may organize a government pursuant to a constitution of their own adoption," Pub. L. No. 81-600, 64 Stat. 319 (1950), Pet. App. 353a, the Constitution thereafter adopted by the Puerto Rico Constitutional Convention and ratified by the people of Puerto Rico, *see* P.R. Const., Pet. App. 358-62a, and approval of that Constitution by both the President and Congress, including recognition that it provides a "republican form of government," Pub. L. No. 82-447, 66 Stat. 327 (1952), Pet. App. 355-56a—refutes that assertion. Pursuant to Congress'

invitation, and with Congress' consent, the people of Puerto Rico engaged in an exercise of popular sovereignty by creating their *own* government "within [their] union with the United States of America." P.R. Const. pmbl., Pet. App. 358a. Accordingly, the Commonwealth's "political power emanates from the people," not the federal government. *Id.* art. I, § 1, Pet. App. 359a.

That is why, as this Court has recognized, "Puerto Rico occupies a relationship to the United States that has no parallel in our history." *Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 596 (1976); *see also Córdova & Simonpietri Ins. Agency, Inc. v. Chase Manhattan Bank, N.A.*, 649 F.2d 36, 41 (1st Cir. 1981) (Breyer, J.) (noting that, in 1950-52, "Puerto Rico's status changed from that of a mere territory to the unique status of Commonwealth"). The Commonwealth of Puerto Rico is unique insofar as it is not a State, but enjoys "government by consent," Pub. L. No. 81-600, Pet. App. 353a, under its own Constitution and laws in union with the United States.

Respondents and their *amici* are thus reduced to arguing that Puerto Rico's Commonwealth status is purely "symbolic." Resps. Br. 36. In their view, Congress *cannot* allow the people of a United States territory to exercise their own authority (as opposed to delegated federal authority) to create their own Constitution and laws. But that argument turns Congress' plenary power under the Territorial Clause upside down. The Commonwealth of Puerto Rico represents inventive statesmanship at its best, by allowing a government of the people, by the people, and for the people of Puerto Rico in union

with the United States. Nothing in the Federal Constitution bars such an arrangement, or condemns Puerto Rico to perpetual colonial status unless it becomes a State or independent nation.

At bottom, respondents and their *amici* invite this Court to tell the people of Puerto Rico—almost 64 years after the creation of the Commonwealth—that their Constitution and laws are not their own after all, that Puerto Rico law is nothing more than delegated federal law, and that their Constitution is thus "a monumental hoax." *Figueroa v. Puerto Rico*, 232 F.2d 615, 620 (1st Cir. 1956). This Court should decline that invitation and reverse the judgment.[1]

ARGUMENT

I. The Double Jeopardy Analysis Turns On The Source Of Authority Of Puerto Rico Law, Not Abstract Notions Of Sovereignty.

According to respondents, "[t]his case begins and ends with an unbroken line of cases from this Court ... holding that under the Double Jeopardy Clause, states are sovereign, and territories are not." Resps. Br. 7 In light of congressional authority under the Territorial Clause, U.S. Const. art. IV, § 3, they

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[1] *Amicus* The Virgin Islands Bar Association challenges this Court's jurisdiction on the ground that the decision below is not "final" under 28 U.S.C. § 1258. *See* VIBA Br. 7-17. That challenge is meritless. The double jeopardy issue here is a "federal issue, finally decided by the highest court in [Puerto Rico], [which] will survive and require decision regardless of the outcome of future state-court proceedings." *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 480 (1975). Although *Cox* involved the finality of a state-court judgment under 28 U.S.C. § 1257, the relevant finality language in § 1258 is identical.

declare, Puerto Rico *cannot* qualify as a "separate sovereign" under the Double Jeopardy Clause. *See id.* at 11-22. That would, in their view, result in the paradox of a "sovereign territory." *E.g.*, *id.* at 4.

These arguments show that respondents have fallen into the same semantic trap as the Puerto Rico Supreme Court below. The "dual sovereignty" doctrine is simply a convenient shorthand to describe the principle that two offenses are not the "same" for double jeopardy purposes if "'the source of the power to punish'" each offense is different. *Lara*, 541 U.S. at 199 (quoting *Wheeler*, 435 U.S. at 322); *see also Heath*, 474 U.S. at 88-91. It could just as well be called the "source of authority" doctrine, or a corollary of the *Blockburger* doctrine for determining whether two offenses are the "same," *see Blockburger v. United States*, 284 U.S. 299, 304 (1932). Contrary to respondents' assertion, the analysis does not require inquiry into whether an entity enjoys what respondents characterize as "fundamental attributes" of sovereignty, such as "equality" and a "political voice." Resps. Br. 18 (emphasis omitted).

And this point is hardly novel. Indeed, the Ninth Circuit made the same mistake as respondents in 1976, when it held that the Navajo Tribe and the United States were not "dual sovereigns" under the Double Jeopardy Clause in light of plenary federal control over Indian tribes (which the Ninth Circuit contrasted to limited federal control over the States and, for that matter, Puerto Rico). *See United States v. Wheeler*, 545 F.2d 1255, 1257-58 & n.7 (9th Cir. 1976). This Court unanimously reversed, holding that the Ninth Circuit had focused on the wrong question. "[T]he Court of Appeals, in relying on

federal control over Indian tribes, ha[s] misconceived the distinction between those cases in which the 'dual sovereignty' concept is applicable and those in which it is not. ... What [matters is] not the extent of control exercised by one prosecuting authority over the other but rather the ultimate source of the power under which the respective prosecutions were undertaken." *Wheeler*, 435 U.S. at 319-20; *see also Lara*, 541 U.S. at 203 (characterizing Indian tribes as "dependent sovereign[s]"). Respondents thus err by insisting that "'sovereignty' [does] not carry any special meaning in the double jeopardy context," Resps. Br. 12; rather, as *Wheeler*, *Heath*, and *Lara* explain, it refers to the source of authority for the respective offenses and nothing more.

Not one of the "unbroken line of cases" invoked by respondents, Resps. Br. 7, addresses the dispositive question here—whether the criminal laws of the Commonwealth of Puerto Rico emanate from a different source of authority than the criminal laws of the United States. Contrary to respondents' assertion, *see* Resps. Br. 7-8, *Grafton v. United States*, 206 U.S. 333 (1907), does not hold, as an immutable and universal truth, that the laws of a federal territory invariably emanate from Congress. Rather, *Grafton* merely holds that, in light of "relations between the United States and the Philippines" at the time, when the Philippines had no constitution of its own, the Philippine territorial government "exert[ed] all [its] powers under and by authority of .... the United States." *Id.* at 354-55.

Similarly unavailing is respondents' reliance on *dicta* from *Puerto Rico v. Shell Co. (P.R.)*, 302 U.S. 253 (1937). *See* Resps. Br. 8-9. That case involved

the preemptive scope of the Sherman Act, and addressed double jeopardy only in passing to reject the suggestion that upholding a Puerto Rico antitrust law might raise double jeopardy concerns. *See* 302 U.S. at 264. The court noted that Puerto Rico's territorial government at the time "was, in all essentials, the same" as the Philippine government in *Grafton*. *Id.* at 265. Thus, the Court declared, "[t]he risk of double jeopardy does not exist" because "[b]oth the territorial and federal laws and the courts ... are creations emanating from the same sovereignty." *Id.* at 264.

Respondents vastly overread *Shell*. At the time of that decision, Puerto Rico was governed under an organic act of Congress, the Jones Act, Pub. L. No. 64-368, 39 Stat. 951 (1917), JA90-131. Respondents try to obscure that point by invoking *Shell*'s observation that the Jones Act gave Puerto Rico "an autonomy similar to that of the states and incorporated territories," and created "'a body politic'—a commonwealth." 302 U.S. at 262. But that is simply a colloquial use of the word "commonwealth" with a small "c," not a reference to the Commonwealth of Puerto Rico, a creation of the Puerto Rico Constitution that would not come into being for another 15 years. Respondents' suggestion that *Shell* addressed the status of the Commonwealth of Puerto Rico for double jeopardy purposes, *see* Resps. Br. 3, is thus misleading at best.

Nor did any of this Court's subsequent cases address the double jeopardy status of the Commonwealth of Puerto Rico. *See* Resps. Br. 9-11. Rather, those cases note that *Grafton* and *Shell* comport with the rule that the double jeopardy

inquiry turns on "the ultimate source of the power under which the respective prosecutions were undertaken"—the territorial laws in *Grafton* and *Shell* simply emanated from delegated federal power. *Wheeler*, 435 U.S. at 320; *see also Waller v. Florida*, 397 U.S. 387, 393-95 & n.5 (1970); *Heath*, 474 U.S. at 88-91. In short, *no* case of this Court—much less "an unbroken line of cases," Resps. Br. 7—holds that territorial law necessarily and invariably *must* emanate from delegated federal power, or that the laws of the Commonwealth of Puerto Rico do so.

II. Puerto Rico Law Emanates From A Different Source Of Authority Than Federal Law.

Respondents' position thus boils down to the startling proposition that "the Puerto Rican Constitution cannot genuinely be characterized as Puerto Ricans' *own* constitution." Resps. Br. 39 (emphasis in original; internal quotation omitted). But that proposition cannot be squared with the text, structure, and history of the key legal documents of the 1950-52 period, or contemporaneous and subsequent analysis thereof (including by this Court)—as indeed respondents' *amicus*, the United States, acknowledged for many years before filing its brief in this case, *see* Supp. App. 1-11a (excerpts from briefs of the United States in *United States v. López Andino*, 831 F.2d 1164 (1st Cir. 1987), and *United States v. Sánchez*, 992 F.2d 1143 (11th Cir. 1993)).

The Commonwealth's legal cornerstone is Public Law 600, enacted amid demands for decolonization after World War II and the creation of the United Nations. That Law, which "was intended to end [Puerto Rico's] subordinate status," *Córdova*, 649

F.2d at 40, did not simply propose to revise the existing organic act governing Puerto Rico. Rather, it proposed the creation of an entirely new government.

Public Law 600 sought "[t]o provide for the organization of a constitutional government *by the people of Puerto Rico*." Pub. L. No. 81-600 pmbl., Pet. App. 353a (emphasis added). The Law recognized that it was time for a new political order based upon "the principle of *government by consent*." *Id.* (emphasis added). Thus, Congress adopted the Law "in the nature of a *compact* so that *the people of Puerto Rico* may organize a government pursuant to *a constitution of their own adoption*." *Id.* (emphasis added). Accordingly, the Law called for a referendum for the people of Puerto Rico to decide whether "to call a constitutional convention to draft a constitution for the said island of Puerto Rico." *Id.* § 2. And Congress set no preconditions for that constitution other than to specify that it "shall provide a republican form of government and shall include a bill of rights." *Id.*

The people of Puerto Rico accepted that "compact," first convening a Constitutional Convention that drafted the Puerto Rico Constitution, and then endorsing that Constitution. The Puerto Rico Constitution is not at all ambiguous or subtle about the source of its power. It is adopted by "[w]e, the people of Puerto Rico ... in the exercise of our natural rights." P.R. Const. pmbl., Pet. App. 358a. It specifies that "[the Commonwealth's] political power *emanates from the people* and shall be exercised in accordance with their will." *Id.* art. I, § 1, Pet. App. 359a (emphasis added); *see also id.* pmbl., Pet. App.

358a ("[T]he democratic system of government is one in which *the will of the people is the source of public power.*") (emphasis added); *id.* art. I, § 2, Pet. App. 359a (all branches of the Commonwealth's government "shall be equally subordinate to *the sovereignty of the people of Puerto Rico*") (emphasis added). And, as particularly relevant here, the Constitution specifies that "[a]ll criminal actions in the courts of the Commonwealth shall be conducted in the name and *by the authority of* 'The People of Puerto Rico.'" *Id.*, art. VI, § 18, Pet. App. 362a (emphasis added).

Both the President and Congress then reviewed and approved the proposed Puerto Rico Constitution. In light of that document's explicit language regarding the source of its authority, they must have understood that they were not merely reviewing another organic act of Congress. To the contrary, both the President and Congress specifically determined that the Puerto Rico Constitution created "a republican form of government." Pub. L. No. 82-447, Pet. App. 355-56a. Although respondents never engage on this point, that is a term of art with respect to a form of government, and "the distinguishing feature of that form is the right of the people to choose *their own* officers for governmental administration, and pass *their own* laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of *the people themselves.*" *Duncan v. McCall*, 139 U.S. 449, 461 (1891) (emphasis added). In a republican form of government, in other words, "the people are ... the source of political power." *Id.*; *see also Public Papers of the Presidents, Harry S. Truman 1952-53*, 472 (1966) ("[T]his constitution is

the product of the people of Puerto Rico.") (statement upon signing Joint Resolution approving Puerto Rico Constitution).

And the United States did not stop there. Rather, it represented to the United Nations that, in light of the Puerto Rico Constitution, the "'political power [of the Commonwealth] *emanates from the people*,'" and thus characterized that Constitution as "similar to that of a State of the Federal Union." Mem. by U.S. Gov't to U.N., JA141 (quoting P.R. Const. art. I, § 1) (emphasis added). It emphasized that the Puerto Rico Legislative Assembly "has full legislative authority in respect to local matters," and contrasted Puerto Rico with such United States territories as Alaska and Hawaii, then governed by "organic acts as enacted by the Congress." JA142, 146. "The people of Puerto Rico have complete autonomy in internal economic matters and in cultural and social affairs under a Constitution adopted by them and approved by the Congress." JA146. In short, the United States explained, the adoption of the Puerto Rico Constitution and the establishment of the Commonwealth represented a "change in the *constitutional position and status* of Puerto Rico," JA135 (emphasis added)—hardly the description of another organic act of Congress.

In response, the United Nations recognized that the United States had fulfilled its "sacred trust" under Article 73, JA132, and that Puerto Rico was no longer a "non-self-governing territory," General Assembly Res. 748, JA148-51. In particular, the United Nations recognized that "the people of the Commonwealth of Puerto Rico, by expressing their will in a free and democratic way, have achieved a

new constitutional status," and that by "choosing their constitutional ... status, the people of the Commonwealth of Puerto Rico have effectively exercised their right to self-determination." JA149-50; *see also id.* at 150 ("[I]n the framework of their Constitution and of the compact agreed upon with the United States of America, the people of the Commonwealth of Puerto Rico have been invested with attributes of political sovereignty which clearly identify the status of self-government attained by the Puerto Rican people as that of an autonomous political entity.").

Contemporary observers well understood, as this Court later confirmed, that the Commonwealth of Puerto Rico was "'organized as a body politic by *the people of Puerto Rico* under their *own* constitution.'" *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 672 (1974) (emphasis added; quoting *Mora v. Mejías*, 206 F.2d 377, 387 (1st Cir. 1953)). One particularly keen observer was Chief Judge Calvert Magruder of the First Circuit, who was uniquely familiar with Puerto Rico by virtue of that court's appellate jurisdiction at the time over decisions not only from the federal district court in Puerto Rico, but also from the Puerto Rico Supreme Court. In a comprehensive essay that this Court has frequently cited with approval, *see, e.g.*, *Flores de Otero*, 426 U.S. at 594; *Calero-Toledo*, 416 U.S. at 672; *Katzenbach v. Morgan*, 384 U.S. 641, 658 & n.19 (1966), Chief Judge Magruder heralded the Commonwealth's "unique constitutional status," which is "unprecedented in our American history and has no exact counterpart elsewhere in the world." Calvert Magruder, *The Commonwealth Status of Puerto Rico*, 15 U. Pitt. L. Rev. 1, 1, 5 (1953). In this

regard, Chief Judge Magruder characterized the Puerto Rico Constitution as the "constituent act of a people who have freely determined to organize themselves in a body politic and to prescribe for themselves a basic framework of self-government." *Id.* at 1, 14. "Whereas the power of the United States exercised over Puerto Rico previously had been based upon the force of conquest from Spain, the new political status of the island within the American system rests upon the consent of its people." *Id.* at 9.

Indeed, it is precisely because the Commonwealth of Puerto Rico differs significantly from a territory governed by an organic act of Congress that this Court has repeatedly concluded that the Commonwealth should be treated like a State for various purposes. Thus, this Court held that the Commonwealth qualifies as a "State" under the Three-Judge Court Act, 28 U.S.C. § 2281, because "Puerto Rico is to be deemed sovereign over matters not ruled by the [Federal] Constitution," as opposed to a mere territory governed by an organic act of Congress. *Calero-Toledo*, 416 U.S. at 673 (internal quotation omitted; distinguishing *Stainback v. Mo Hock Ke Lo Po*, 336 U.S. 368 (1949), on this ground). And this Court characterized Puerto Rico law as "State" law within the meaning of a jurisdictional provision governing federal civil-rights cases, 28 U.S.C. § 1343, because the people of Puerto Rico had "draft[ed] *their own* constitution," and their legislature now "amends *its own* civil and criminal code." *Flores de Otero*, 426 U.S. at 593-94 (emphasis added); *see also Rodríguez v. Popular Democratic Party*, 457 U.S. 1, 8 (1982) (noting that the Commonwealth is "'sovereign over matters not ruled

by the [Federal] Constitution.'") (quoting *Calero-Toledo*, 416 U.S. at 673).

Respondents and their *amici* never seriously respond to any of the foregoing. Rather, they compare the relationship between Puerto Rico and the United States to the relationship between a municipality and a State. *See, e.g.*, Resps. Br. 23-24 (citing *Waller*, 397 U.S. at 393). But the case on which they rely, *Waller*, stands only for the proposition that "municipalities *that derive their power to try a defendant from the same organic law that empowers the State to prosecute* are not separate sovereigns with respect to the State." *Heath*, 474 U.S. at 90 (emphasis added; citing *Waller*). The Commonwealth of Puerto Rico, in sharp contrast, does not "derive [its] power to try a defendant from the same organic law that empowers [the Federal Government] to prosecute." *Id.* Accordingly, *Waller* has no bearing here.

In this regard, the Commonwealth of Puerto Rico differs markedly from such territories as the Virgin Islands, Guam, and American Samoa, which explains its "unique status" within the American political family. *Córdova*, 649 F.2d at 41. Those territories—like the District of Columbia—enjoy "home rule" under delegated federal law, but lack their own constitutions adopted by their own people and approved by Congress. *See* Petr. Br. 38-39 n.4. Indeed, the United Nations continues to view those territories—in sharp contrast to Puerto Rico (and, for that matter, the Northern Mariana Islands)—as non-self-governing. *See* United Nations, *The United Nations and Decolonization: Non-Self-Governing*

Territories, *available at* http://bit.ly/Lbb0GY (last visited Jan. 5, 2016).

Accordingly, it is unsurprising that courts have concluded that the laws of those territories and the District of Columbia emanate from the same source of authority as federal law for double jeopardy purposes. *See* Petr. Br. 38-39 n.4. Respondents thus err by asserting that petitioner "is unable to offer a clear rule" in this context. Resps. Br. 53. Puerto Rico differs from those territories (and municipalities) for double jeopardy purposes because it does not merely enjoy "home rule"; rather, it enjoys "government by consent" under its own Constitution approved by Congress. *See* Pub. L. No. 81-600, Pet. App. 353a; Pub. L. No. 82-447, Pet. App. 355-56a; *cf. Lara*, 541 U.S. at 199 (upholding Congress' power to recognize exercise of sovereignty). Respondents' contrary "clear rule" is nothing more than the *ipse dixit* that the Federal Government, the States, and the Indian tribes are sovereign, while every other governmental entity is not. *See, e.g.*, Resps. Br. 52; *see also* U.S. Br. 12.

Respondents' reliance on "the legislative history of the 1950-1952 legislation," Resps. Br. 36, is equally unavailing. In their view, that history "reveal[s] a consensus that the enactment would not alter Puerto Rico's fundamental political status." *Id.*; *see also* U.S. Br. 22-24. But their cherry-picked quotes simply underscore that Public Law 600 was neither "a statehood bill" nor "an independence bill." S. Rep. No. 1779, 81st Cong., 2d Sess. 4 (1950); *see also* S. Rep. No. 1720, 82d Cong., 2d Sess. 6 (1952). Nothing in the legislative history denies that the people of Puerto Rico exercised their *own* political

rights to create their *own* Constitution and laws in union with the United States. To the contrary, the legislative history confirms—in the words of House Majority Leader John McCormack—that the Puerto Rico Constitution "is a new experiment; it is a turning away from the territorial status; it is something intermediary between the territorial status and statehood." 98 Cong. Rec. 5128 (1952); *see also id.* at 6184 ("This procedure is something entirely new in the history of the Government of the United States. We are not treating Puerto Rico as a State and we are not treating Puerto Rico as a possession.") (statement of Rep. Aspinall).

Respondents insist, however, that the Puerto Rico Constitution cannot be attributed to the people of Puerto Rico because Congress invited it in the first instance and then approved it with conditions. *See* Resps. Br. 23-26, 39-44; *see also* U.S. Br. 22-24. Both assertions miss the mark; indeed, if Congress had *not* invited and approved this exercise of popular sovereignty, respondents would have denounced it as a rogue usurpation of authority. Concerns about conflicting "internal and external intentions," Resps. Br. 54, or unilateral territorial action "creat[ing] a separate sovereign," Profs.' *Amicus* Br. 5, are accordingly misplaced. The people of Puerto Rico are the ultimate source of authority for their Constitution and laws in light of action by the people *and* Congress.

The fact that Congress invited the people of Puerto Rico to adopt their own Constitution, *see* Pub. L. No. 81-600, Pet. App. 353-54a, hardly means that the Constitution is based on delegated federal power. To the contrary, Congress also invited the people of

many territories that became States to draft their own constitutions, *see* Petr. Br. App. A, and those constitutions are not thereby based on delegated federal power.

Nor does Congress' approval of the Puerto Rico Constitution prove that it is based on delegated federal power; to the contrary, as noted above, the Constitution specifies that its political power "emanates from the people," in "the exercise of [their] natural rights." P.R. Const. pmbl., art. I, § 1, Pet. App. 358-59a. Respondents err by asserting that the Constitution was "unilaterally revised by Congress to remove Section 20, and then put into effect without after-the-fact ratification by the Puerto Rican people." Resps. Br. 42-43. Rather, Congress conditioned its approval of the Constitution on "acceptance" of certain proposed changes by "the Constitutional Convention of Puerto Rico ... *in the name of the people of Puerto Rico*." Pub. L. No. 82-447, Pet. App. 357a (emphasis added). The Convention accepted those changes, and the people subsequently ratified them, in their own name, by popular vote. *See* Petr. Br. 9-10.[2]

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[2] Congress followed a similar procedure when conditionally approving numerous state constitutions, including those of Arizona, Missouri, Nebraska, and West Virginia. *See* Petr. Br. 34-36 & App. B. Respondents counter that those conditions were either unconstitutional *ab initio* or retroactively vanished once Statehood was achieved. *See* Resps. Br. 43-44. But that misses the point: Congress routinely reviews and approves state constitutions, sometimes conditionally, and such review and approval does not thereby mean that such constitutions are based on delegated federal power.

Ultimately, respondents and their *amici* fall back on the argument that Congress remains "the ultimate source of the power" of the laws of Commonwealth of Puerto Rico, Resps. Br. 4, 7, 22, 23 (quoting *Wheeler*, 435 U.S. at 320), on the theory that Congress retains plenary authority over Puerto Rico under the Territorial Clause, U.S. Const. art. IV, § 3, and could "amend or repeal its 1950-1952 legislation" at any time. Resps. Br. 27; *see also* U.S. Br. 8-9, 24-25. But that is simply a reprise of the argument this Court unanimously *rejected* in *Wheeler*: that "the extent of *control* exercised by one prosecuting authority over the other" determines whether a successive prosecution implicates the Double Jeopardy Clause. 435 U.S. at 320 (emphasis added). It was "undisputed" in *Wheeler* that "Congress has plenary authority to legislate for the Indian tribes in all matters, including their form of government," so that the tribes were "subject to ultimate federal control." *Id.* at 319, 322. But that point was irrelevant to the double jeopardy analysis, because the tribal laws at issue did not emanate from Congress. *See id.* at 322.

Similarly, regardless of the extent of congressional control over Puerto Rico under the Territorial Clause—and respondents tellingly fail to address this Court's recognition that Congress in 1952 "relinquished its control over the organization of the local affairs of the island," *Flores de Otero*, 426 U.S. at 597—there can be no question that the Commonwealth laws at issue here do *not* emanate from Congress. Rather, they emanate from the Puerto Rico Legislative Assembly, in the exercise of authority delegated by the people of Puerto Rico through their Constitution. That point resolves this

case. *See Lara*, 541 U.S. at 199; *Heath*, 474 U.S. at 88-91; *Wheeler*, 435 U.S. at 319-20.

III. The Federal Constitution Allows Congress To Recognize Democratic Self-Governance By The People Of Puerto Rico.

Ultimately, respondents and their *amici* contend that whatever was said and done in the 1950-52 era does not matter, because Congress *cannot* constitutionally allow the people of Puerto Rico to provide the authority for their own Constitution and laws. *See, e.g.*, Resps. Br. 4, 11-15; U.S. Br. 7, 9, 15-19, 25, 31-33. Under this view, the Territorial Clause places Congress in a constitutional straightjacket whereby it *must* govern territories via direct or delegated federal power unless and until it grants them Statehood or independence. *See, e.g.*, U.S. Br. 32. That position turns the Territorial Clause on its head.

Respondents and their *amici* concede, as they must, that the Territorial Clause vests Congress with "plenary power" over the territories. *See, e.g.*, Resps. Br. 4; *see generally Kansas v. Colorado*, 206 U.S. 46, 92 (1907); *Downes v. Bidwell*, 182 U.S. 244, 268 (1901); *United States v. Gratiot*, 39 U.S. (14 Pet.) 526, 537-38 (1840). They argue, however, that the Constitution nonetheless bars Congress from allowing the people of a territory to exercise their *own* political rights to establish their *own* Constitution and laws; that would create the anomaly of a "sovereign territory," Resps. Br. 4, and impermissibly "divest a future Congress of its constitutional power to administer that territory," U.S. Br. 25. Those arguments are baseless.

To the contrary, at least with respect to unincorporated territories, Congress' plenary power necessarily includes the power to develop inventive approaches to territorial governance, including the power to allow the people of a territory to exercise their own political rights. As Felix Frankfurter, then the Law Officer in the Bureau of Insular Affairs at the Department of War, wrote over a century ago:

> C. The form of the relationship between the United States and unincorporated territory is solely a problem of statesmanship.
>
> 1. History suggests a great diversity of relationships between a central government and dependent territory. The present day shows a great variety in actual operation. One of the great demands upon inventive statesmanship is to help evolve new kinds of relationship so as to combine the advantages of local self-government with those of a confederated union. Luckily, our Constitution has left this field of invention open. The decisions in the Insular cases mean this, if they mean anything, that there is nothing in the Constitution to hamper the responsibility of Congress in working out, step by step, forms of government for our Insular possessions responsive to the largest needs and capacities of their inhabitants, and ascertained by the best wisdom of Congress.

Felix Frankfurter, *Memorandum for the Secretary of War Re: The Political Status of Porto Rico*, at 3 (Mar.

11, 1914), *available at* http://tinyurl.com/hsd4xof (last visited Jan. 5, 2016); *see also* Office of Legal Counsel, *Memorandum re: Power of the United States to Conclude with the Commonwealth of Puerto Rico a Compact Which Could Be Modified Only By Mutual Consent*, at 3-6 (July 23, 1963), *available at* http://tinyurl.com/pdooszy (last visited Jan. 5, 2016); 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1319 (1st ed. 1833) ("What shall be the form of government established in the territories depends exclusively upon the discretion of congress.").

That insight governs this case. Nothing in the text, structure, or history of the Constitution requires Congress to follow a one-size-fits-all approach to the governance of territories—or conversely bars Congress from "fully recognizing the principle of government by consent" in a territory. Pub. L. No. 81-600, Pet. App. 353a; *see generally United States v. De Leon Guerrero*, 4 F.3d 749, 754 (9th Cir. 1993); *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 319 (1937) (during transition to Philippine independence, "the power of the United States has been modified, [but] not abolished"). Respondents' assertion that petitioner "finds in the Territory Clause a *hidden authorization* for Congress to create two fundamentally different types of territories," Resps. Br. 13, thus gets matters backwards: respondents purport to find in that Clause a *hidden limitation* on Congress' plenary power. If Congress could grant independence to the Philippines, *see* Pub. L. No. 73-127, 48 Stat. 456 (1934), or cede the Canal Zone to Panama, *see* Panama Canal Treaty, 33 U.S.T. 141 (1977), surely it could allow the people of Puerto Rico to exercise their

own political rights to create their own Constitution and laws in union with the United States. Here, as noted above, Congress unmistakably did just that. *See* Pub. L. No. 81-600, Pet. App. 353-54a; Pub. L. No. 82-447, Pet. App. 355-57a.

In curious juxtaposition to their restrictive gloss on Congress' authority under the Territorial Clause to recognize democratic political rights, respondents and their *amici* take a freewheeling approach to Congress' authority under that Clause to ignore the separation of powers. Congress, they assert, has free rein under the Territorial Clause to delegate federal power, including the quintessentially *executive* federal power of enforcing the criminal laws, to territorial officials free of federal executive control. *See* Resps. Br. 35 n.6; U.S. Br. 21-22 n.4. But this Court has long applied separation-of-powers principles to the territories. *See, e.g., Springer v. Philippine Islands*, 277 U.S. 189, 200-07 (1928). If the Puerto Rico prosecutors in this case were exercising delegated federal power, they would be doing so in a constitutionally unknown fashion, completely free of any and all federal control. *See generally Lara*, 541 U.S. at 216 (Thomas, J., concurring in the judgment) (concluding that tribal prosecutors exercised inherent tribal power, rather than delegated federal power, because otherwise "grave constitutional difficulties" would be presented). And because the separation of powers protects the liberty of the people, not just the prerogatives of the Executive Branch, this Court must vindicate these principles even when the Executive Branch does not. *See, e.g., Metropolitan Wash. Airports Auth. v. Citizens for Abatement of*

Aircraft Noise, Inc., 501 U.S. 252, 263-64, 271-77 (1991).

The Commonwealth of Puerto Rico represents "inventive statesmanship" at its best: it allows Puerto Rico to remain in democratic union with the United States without becoming a State (and thereby subjecting itself to the uniformity requirements that Statehood would entail, which might conflict with Puerto Rico's distinctive history, economy, and society).[3] Commonwealth status, under which the people of Puerto Rico govern themselves under their own Constitution and laws, has provided certainty and stability for the better part of a century. Respondents and their *amici* are obviously free to advocate other political status options. But make no mistake—they are asking this Court, after 64 years, to hold the Commonwealth option either illusory or unconstitutional, and thereby to return the island to colonial status. This Court should decline that far-reaching and unsettling request.

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[3] Ironically, respondents suggest that Puerto Rico's position in this case might subject the Commonwealth to "the Constitution's requirement that taxes be uniform nationwide." Resps. Br. 57. That suggestion is baseless. Puerto Rico does not contend that it is a State; rather, the Territorial Clause applies under the terms of the "compact" offered by Public Law 600 and accepted by the people of Puerto Rico. *See, e.g., Harris v. Rosario*, 446 U.S. 651, 651-52 (1980) (*per curiam*). Congress has always engaged in "inventive statesmanship" by recognizing that "[t]he welfare of Porto Rico forbids" the inflexible application of federal law to the island; thus—in 1914 as now—"to include [Puerto Rico] within the general taxing legislation of this country" would be to devastate the local economy. Frankfurter, *Memorandum*, at 5.

* * *

In his seminal essay, Chief Judge Magruder quoted the Commonwealth's great proponent, Governor Luis Muñoz Marín, as declaring that this new constitutional status "will proclaim to the world that Democracy declares all peoples, as all men, equal in dignity." Magruder, *Commonwealth Status*, 15 U. Pitt. L. Rev. at 20. Chief Judge Magruder ventured to predict that "the United States will *never* take any action to crush or dampen the spirit of these eloquent words spoken by the chosen leader of the Puerto Rican people." *Id.* (emphasis in original).

Respondents and their *amici*, including the United States, now ask this Court to do just that, arguing that the United States *did* not and *could* not allow the people of Puerto Rico to provide the authority for their own Constitution and laws. They are wrong. Accordingly, respondents' convictions under federal criminal law, which emanates from Congress, pose no double jeopardy bar to their prosecution under Commonwealth criminal law, which emanates from the people of Puerto Rico.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment.

Respectfully submitted,

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SUPPLEMENTAL APPENDIX

Supp. App. 1

Nos. 86-1583, 86-1584

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

UNITED STATES OF AMERICA,

Appellee

v.

HECTOR LUIS LOPEZ ANDINO,
ISRAEL MENDEZ SANTIAGO,

Defendants-Appellants

On Appeal from the United States District Court for the District of Puerto Rico

BRIEF FOR THE UNITED STATES

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* * *

IV

DEFENDANTS' PROSECUTION IN FEDERAL COURT FOLLOWING PROSECUTION IN A PUERTO RICAN COURT ARISING FROM THE SAME ACTS DID NOT VIOLATE THEIR FIFTH AMENDMENT RIGHT AGAINST DOUBLE JEOPARDY

Defendant Mendez Santiago also complains (Br. 22-25) that his federal civil rights trial subjected him to double jeopardy in violation of the Fifth Amendment to the United States Constitution because he was previously convicted of involuntary manslaughter in a Puerto Rican court for the same acts as formed the basis for the federal conviction.[11] Although it is uniformly recognized "that a federal prosecution does not bar a subsequent state prosecution of the same person for the same acts, and a state prosecution does not bar a federal one," *United States v. Wheeler*, 435 U.S. 313, 317 (1978); *Bartkus v. Illinois*, 359 U.S. 121 (1959); *Abbate v. United States*, 359 U.S. 187 (1959), defendant argues (Br. 24) that the "dual sovereignty" doctrine does not apply because Puerto Rico is not one of the states of the Union.

While we have found no cases from this circuit discussing whether Puerto Rico should be treated as

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[11] The double jeopardy issue was not raised in the district court and nothing in the record reflects the disposition of the Puerto Rican prosecution. The government was aware, however, of the Puerto Rican prosecution before the federal indictment was sought and that defendants were convicted of involuntary manslaughter and given suspended sentences.

a state for purposes of the dual sovereignty doctrine, this Court applied the doctrine in upholding a federal prosecution following a Puerto Rican prosecution for the same acts. *United States v. Benmuhar*, 658 F.2d 14, 18 (1st Cir. 1981), *cert. denied sub nom. Nieves v. United States*, 457 U.S. 1117 (1982). This case is consistent with the rationale consistently followed by the Supreme Court for over one hundred years. Whether a governmental entity represents a sovereign distinct from the national government depends upon whether it has governmental authority distinct from that of the federal government to denounce acts as criminal and to bring criminal prosecutions. *Heath v. Alabama*, 54 U.S.L.W. 4016 (U.S. Dec. 3, 1985). As explained in *United States v. Wheeler*, *supra*, and *Heath*, *supra*, a state's authority to bring criminal prosecutions rests upon its own sovereignty and not on authority delegated to it by the federal government. A state prosecution does not, therefore, bar prosecution by another "sovereign," *e.g.*, another state (*Heath*), an Indian tribe (*Wheeler*) or the federal government (*Abbate v. United States*, *supra*).

Since 1952, Puerto Rico has operated under a Constitution adopted by the people of Puerto Rico pursuant to the Puerto Rican Federal Relations Act, 48 U.S.C. 731b-734. The Act, "recognizing the principle of government by consent" offered the Puerto Rican people a relationship with the United States "in the nature of a compact." 48 U.S.C. 731b. The Supreme Court has recognized that "the purpose of Congress in the 1950 and 1952 legislation was to accord to Puerto Rico the degree of autonomy and independence normally associated with States of the

Union." *Examining Board v. Otero*, 426 U.S. 572, 594 (1976).

When Congress approved the Puerto Rican Constitution, it understood that "[a]s regards local matters, the sphere of action and the methods of government bear a resemblance to that of any State of the Union." S. Rep. No. 1720, 82d Cong., 2d Sess. 6 (1952). This Court has consistently dealt with Puerto Rico as "'sovereign over matters not ruled by the Constitution' of the United States." *Mora v. Mejias*, 206 F.2d 377, 387 (1st Cir. 1953); see *Puerto Rico v. Branstad*, No. 85-2116 (U.S. June 23, 1987) (Puerto Rico has same right to extradition of fugitives as states); *Alcoa Steamship Co. v. Perez*, 424 F.2d 433 (1st Cir. 1970) (Puerto Rico has same sovereign immunity as states). Thus, the source of the Commonwealth's authority to prosecute defendants for local crimes is its own popularly adopted Constitution. Under the doctrine of *Abbate v. United States, supra*, such a prosecution does not bar a subsequent federal prosecution under a federal statute for the same acts.

Puerto Rico's present political autonomy is distinguishable from its pre-1952 status. As an "insular dependency," its former government derived all its powers from Congress acting under the Treaty of Paris of 1898. See *Puerto Rico v. Shell Co., supra*. A prosecution by such a government might bar a subsequent federal prosecution. See *Grafton v. United States*, 206 U.S. 333 (1907). In any event, the consistent recognition of Puerto Rican autonomy in nonfederal matters since the adoption of its Constitution demonstrates that defendants' prior prosecution was based as much upon "sovereignty"

separate from that of the federal government as would be a prosecution by any of the states. Such a prosecution does not depend upon authority delegated by Congress.

If, as defendant suggests (Br. 24-25), Puerto Rico possesses autonomy comparable to the nations of the British Commonwealth, such as Canada, Australia, or New Zealand, its "sovereignty" would be enhanced, not lessened, under the rationale of *Heath*, *Wheeler*, *Bartkus* and *Abbate*. Defendant's argument, in essence, is that this Court should follow common law opinions of British, or British Commonwealth, courts rather than Constitutional rulings of the United States Supreme Court.[12] Under American Constitutional law, prosecution by a "sovereign" separate from the federal government does not bar a subsequent federal prosecution for the same acts. Since Puerto Rico has possessed "sovereignty" comparable to the states since, at least, 1952, defendant's double jeopardy argument should be rejected.

* * *

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[12] The sole authority cited by defendant in support of his thesis, J.A.C. Grant, *Successive Prosecutions by State and Nation: Common Law and British Empire Comparisons*. 4 U.C.L.A. L. Rev. 1 (1956), argues for elimination of the dual sovereignty doctrine because it is inconsistent with the common law rule allegedly followed outside the United States.

United States Court of Appeals,
Eleventh Circuit.

UNITED STATES OF AMERICA, Appellee,

v.

Rafael SANCHEZ and Luis SANCHEZ, Appellants.

No. 90-5749
April 13,1992.

On Appeal from the United States District Court for the Southern District of Florida

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* * *

ARGUMENT

I

THE DISTRICT COURT PROPERLY DENIED APPELLANTS' JOINT MOTION TO DISMISS THE INDICTMENT BASED ON ALLEGED DOUBLE JEOPARDY AND COLLATERAL ESTOPPEL.

Appellants were charged in the Commonwealth of Puerto Rico with first degree murder, destruction, conspiracy, attempted murder, unlawful use of explosives and unlawful possession of explosives

(R:). They were acquitted of those charges prior to the return of the indictment in this case. Appellants filed numerous motions and supplemental pleadings in the trial court to persuade the magistrate judge and the district judge that this federal case was barred by double jeopardy because they had been acquitted in Puerto Rico of charges arising out of the same murder contract.

The magistrate judge in this case held hearings, considered the written and oral arguments of counsel, and issued an extensive report and recommendation denying the motion to dismiss based on *Blockburger* v. *United States*, 284 U.S. 299 (1932) and the dual sovereignty doctrine (R61:14). The trial court adopted that ruling and issued its own opinion consistent with that ruling. *United States v. Sanchez*, 741 F. Supp. 215 (S.D. Fla. 1990).

Appellants now argue that in *Grady v. Corbin*, 495 U.S. 508 (1990), decided after the trial in this case, the Supreme Court changed the test for double jeopardy and now they are entitled to dismissal. *Grady*, however, does not control the outcome here where the trials were conducted by two separate sovereigns, the federal government and the Commonwealth of Puerto Rico, because the dual sovereignty doctrine provides an exception to the Fifth Amendment bar against double jeopardy where the subsequent prosecution is conducted by a distinctly different sovereign. *Heath v. Alabama*, 474 U.S. 82, 93 (1985); *United States v. Wheeler*, 435 U.S. 313, 317 (1978); *Abbate v. United States*, 359 U.S. 187 (1959).

The Supreme Court has repeatedly held that a single act can violate both state and federal laws

and, since these separate sovereigns have separate interests to protect in enacting their criminal statutes, successive prosecutions for the same offense is not barred by the double jeopardy clause. The critical determination is whether the two entities derive their authority to punish from distinct sources of power. *Bartkus v. Illinois*, 359 U.S. 121 (1959); *Heath v. Alabama*, 474 U.S. 82 (1985).

Here, the first prosecution was conducted by the Commonwealth of Puerto Rico; the second by the United States government. As the Supreme Court stated in *United States v. Lanza*, 260 U.S. 377 (1922):

> Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other. It follows that an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each.

260 U.S. at 383; *see also Heath*, 474 U.S. at 89; *Abbate*, 359 U.S. at 194.

Appellants do not contest the vitality of the dual sovereignty doctrine (Br. at 22-23). Rather, they argue that the Commonwealth of Puerto Rico and the federal government are the alter ego of one another, insisting that Puerto Rico is still a territory and not a separate state for purposes of double jeopardy. That argument is without legal or factual support and was properly rejected by the magistrate judge (R61:7-14) and the trial court below. *United States v. Sanchez*, 741 F. Supp. 215, 218-219 (S.D. Fla. 1990).

The First Circuit has consistently held that Puerto Rico is a state for purposes of double jeopardy. *E.g., United States v. Morales-Diaz,* 925 F.2d 535, 540 (1st Cir. 1991); *see United States v. Bonilla-Romero,* 836 F.2d 39, 41 (1st Cir. 1987), *cert. denied,* 488 U.S. 817 (1988) (holding that, for purposes of further state prosecution, Puerto Rico is a separate sovereign from the federal government for the limited purposes of the double jeopardy clause); *United States v. Lopez-Andino,* 831 F.2d 1164 (1st Cir. 1987), *cert. denied,* 468 U.S. 1034 (1988) (holding that double jeopardy clause did not bar federal prosecution of policemen for civil rights violations following their conviction of aggravated battery and involuntary manslaughter in commonwealth court because it is established that Puerto Rico is to be treated as a state for purposes of the double jeopardy clause ...); *United States v. Benhumar,* 658 F.2d 14 (1st Cir. 1981) (finding that federal prosecution for arson conspiracy following, dismissal of state charges of substantive arson for lack of evidence not barred by double jeopardy as a single act can violate both state and federal law and can thus create two separate offenses), *cert. denied,* 457 U.S. 1117 (1982); *Cf. United States v. Quiñones,* 758 F.2d 40 (1st Cir. 1985).

In *Bonilla-Romero,* the court interpreted *Lopez-Andino* as holding that "despite Puerto Rico's constitutional status as a territory, it is a separate sovereign for the limited purpose of the double jeopardy clause." The court further explained that:

> [*Lopez-Andino*] recognized that Puerto Rico has been given such complete control over its local criminal affairs that it may freely prosecute criminal behavior under

> its own laws regardless of whether the federal government prosecutes the same behavior under federal law.

Bonilla-Romero, 836 F.2d at 42.

While appellants are correct that the Supreme Court held in *People of Puerto Rico v. Shell,* 302 U.S. 253 (1937), that Puerto Rico does not constitute a distinct sovereign for double jeopardy purposes, that decision preceded the passage of the Puerto Rican Federal Relations Act, Publ. L. No. 600, 64 Stat. 319 (1950), the statute that established Puerto Rico as a Commonwealth rather than a territory. That statute overrides the Court's holding in *Shell.* Thus, cases cited by appellants, including *Waller v. Florida,* 397 U.S. 387 (1970), analogizing to the power of states and municipalities, and *United States v. Wheeler,* 435 U.S. 313 (1978), considering the relationship of tribal governments to the federal government, are irrelevant because Puerto Rico is a Commonwealth and has been clearly held to be a state for double jeopardy purposes.[7]

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[7] The decision in *Harris v. Rosario,* 446 U.S. 651 (1980), does not compel a different result either, because it has no application to the double jeopardy clause of the constitution. As the magistrate judge here correctly noted, *Harris v. Rosario* merely held that in apportioning federal funds to families with dependent children, Congress could treat Puerto Rico differently from a state in ruling on an equal protection challenge because there was a rational basis for providing less funding to Puerto Rico. The court specifically noted that Puerto Rico does not contribute to the federal treasury. Likewise, appellants' reliance upon *Detres v. Lions Building Corp.,* 234 F.2d 596 (7th Cir. 1956), is misplaced. *Detres* merely held that Public Law 600, in naming Puerto Rico as a Commonwealth,

* * *

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did not remove it from territorial status for purposes of civil diversity jurisdiction. In fact, the court upheld Puerto Rico's separate existence from the federal government and held it should be treated like a state for purposes of diversity jurisdiction. 234 F.2d at 603. Moreover, no comments, even by Department of Justice officials in GAO reports, have the force of law. Accordingly, appellants' reliance on GAO Report, U.S. Insular Areas: Applicability of Relevant Provisions of the U.S. Constitution, Appendix IV. "Comments from the Assistant Attorney general for Administration, U.S. Department of Justice" (June 1991) is misplaced.

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No. 15-108

IN THE
Supreme Court of the United States

THE COMMONWEALTH OF PUERTO RICO,

Petitioner,

v.

LUIS M. SÁNCHEZ VALLE AND
JAIME GÓMEZ VÁZQUEZ,

Respondents.

On Writ of Certiorari to the Supreme Court of Puerto Rico

SUPPLEMENTAL BRIEF FOR PETITIONER

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SUPPLEMENTAL BRIEF FOR PETITIONER

Amicus VIBA contends that this Court lacks jurisdiction over this case on the theory that the Puerto Rico Supreme Court decision below is not a "final judgment[]" under 28 U.S.C. § 1258. *See* VIBA Br. 7-17. While this Court certainly has "an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party," *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006), there is a good reason why neither respondents nor any of the other *amici*, including the United States, raised this ostensible jurisdictional issue—it has no merit.

The Commonwealth issued three separate criminal complaints against each respondent. Respondent Sánchez Valle was charged with (1) selling a firearm without a permit in violation of Section 5.01 of the Puerto Rico Weapons Act, 25 P.R. Laws Ann. § 458, JA11, (2) selling ammunition without a permit in violation of Section 5.01 of the Puerto Rico Weapons Act, 25 P.R. Laws Ann. § 458, JA12, and (3) carrying a firearm in violation of Section 5.04 of the Puerto Rico Weapons Act, 25 P.R. Laws Ann. § 458c, JA13; *see generally* Pet. App. 2a (describing charges against respondent Sánchez Valle); JA7 (describing filing of "3 Complaints," numbered VP08-2802 to VPO8-2804, against Sánchez Valle); Pet. App. 244a (describing "the decisions issued in criminal cases numbers ... VP2008-2802 to 2804"). Respondent Gómez Vázquez, for his part, was charged with (1) selling a firearm without a permit in violation of Section 5.01 of the Puerto Rico Weapons Act, 25 P.R. Laws Ann. § 458, JA31, (2) carrying a rifle in violation of Section

5.07 of the Puerto Rico Weapons Act, 25 P.R. Laws Ann. § 458f, JA32, and (3) carrying and selling a mutilated firearm in violation of Section 5.10 of the Puerto Rico Weapons Act, 25 P.R. Laws Ann. § 458i, JA33; *see generally* Pet. App. 4a (describing charges against respondent Gómez Vázquez); JA9 (describing filing of "3 Complaints," numbered VP2008-2805 to VP2008-2807, against Gómez Vázquez); Pet. App. 244a (describing "the decisions issued in criminal cases numbers ... VP2008-2805 to 2807").

VIBA argues that the judgment below is not "final" because the Puerto Rico Supreme Court "ordered dismissal of *only* the count in each indictment related to § 458 of the Puerto Rico Weapons Act," the unlawful *sale* of a firearm or ammunition. VIBA Br. 9 (citing Pet. App. 69a; emphasis in original). In VIBA's view, "[b]ecause the Supreme Court's decision affected some but not all of the counts against Respondents, it was not a final judgment." VIBA Br. 9; *see generally* Pet. App. 10a.

That is so, VIBA argues, because "there exists in criminal cases a 'firm congressional policy against interlocutory or "piecemeal" appeals,'" and the Puerto Rico Supreme Court decision does not "fall within the 'collateral order' exception" to that policy. VIBA Br. 10-11 (quoting *Abney v. United States*, 431 U.S. 651, 656 (1977)). But that argument displays a fundamental misunderstanding of appellate procedure. *Abney* and the "collateral order" doctrine involve finality under 28 U.S.C. § 1291 for purposes of appeal from a United States district court to a United States court of appeals. Section 1291 and the "collateral order doctrine" are not implicated in a case arising from state (or Puerto Rico) court.

Rather, in cases arising from state (or Puerto Rico) court, the question is whether the judgment of the State's "highest court," 28 U.S.C. § 1257(a)—or, in the case of Puerto Rico, "the Supreme Court of the Commonwealth of Puerto Rico," *id.* § 1258(a)—is "final." The Puerto Rico Supreme Court's judgment in this case readily satisfies this standard.

As a threshold matter, VIBA errs by describing the three charges against each respondents as different "counts" of a "multi-count indictment." VIBA Br. 3. Although Puerto Rico law provides that "[t]wo or more offenses *may* be charged in the same information or complaint in a separate count for each offense," P.R. R. Crim. P 37(a) (emphasis added), a prosecuting attorney is not *required* to charge multiple related offenses in a single complaint, *see, e.g.*, *Fuentes Morales v. Superior Ct.*, 2 P.R. Offic. Trans. 910, 913 (1974) (*per curiam*), and that is not the common practice. Thus, in this case, there was no "multi-count indictment." Rather, as explained above, *each* of the charges against respondents was filed in a *separate* complaint with its *own* docket number. Accordingly, as a matter of Puerto Rico law, each complaint stands on its own, and each complaint ordered dismissed by the Puerto Rico Supreme Court is now completely finished, independent of the other charges. (The Court of Appeals consolidated the various appeals, but not the underlying cases. *See* Pet. App. 245a.) Regardless of the resolution of the other charges, petitioner has no further ability to pursue appellate review of the dismissed charges.

And the result would be the same even if each of the separate complaints were considered separate

counts of a single complaint. As this Court has long explained in construing 28 U.S.C. § 1257—the state-law analogue to § 1258, which contains materially identical finality language—a judgment may be final even in a single case "in which the highest court of a State has finally determined the federal issue present ..., but in which there are further proceedings in the lower courts to come." *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 477 (1975).[1]

In particular, this is a case "in which the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings." *Id.* at 480. "Nothing that could happen in the course of the [future state-court proceedings], short of settlement of the case, would foreclose or make unnecessary decision on the federal question." *Id.*

The same is true here. The Puerto Rico Supreme Court has conclusively decided that the federal

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[1] VIBA asserts that because "a judgment rendered in the Puerto Rico Supreme Court is not a state court judgment under § 1257," then "arguably, *Cox* does not apply." VIBA Br. 15. The premise is correct, but the conclusion is not. Congress enacted § 1258 precisely because Puerto Rico is not covered by § 1257. VIBA suggests no reason why the *Cox* finality standard applicable to state courts under § 1257 should not apply to Puerto Rico courts under § 1258, when the relevant finality language and the policies served by both provisions are the same. VIBA's reliance on *Fornaris v. Ridge Tool Co.*, 400 U.S. 41, 42 n.1 (1970) (*per curiam*), *see* VIBA Br. 15, is inexplicable: the cited footnote has nothing to do with the *Cox* issue, but instead discusses a long-repealed provision vesting this Court with appellate jurisdiction over cases in which a federal court of appeals invalidated a state statute.

Double Jeopardy Clause bars the Commonwealth from trying respondents on Commonwealth charges involving the sale of a weapon or ammunition in violation of Section 5.01 of the Puerto Rico Weapons Act, 25 P.R. Laws Ann. § 458. *See* Pet. App. 9-10a, 69a. Nothing that can happen with respect to the remaining charges could "foreclose or make unnecessary decision on the federal question." *Cox*, 420 U.S. at 480.

VIBA asserts that the federal issue presented here will not "necessarily survive regardless of the outcome" of any proceedings on the other charges. VIBA Br. 16. According to VIBA, "if the Respondents are ultimately acquitted on the remaining charges—Sections 458c (illegally carrying a firearm), 458f (illegally carrying a rifle), and 458i (transferring a mutilated weapon) charges—then collateral estoppel would *likely* prevent a prosecution under Section 458 (illegally selling and transferring a firearm), since the jury would have necessarily found that the Respondents never possessed a firearm." *Id.* (emphasis added).

But that speculative argument fails on its own terms. There is no legal or logical reason why *sale* presupposes *possession*, as one can sell something that one does not carry or possess. *See, e.g.*, *Henderson v. United States*, 135 S. Ct. 1780, 1785 (2015); *Albrecht v. United States*, 273 U.S. 1, 11-12 (1927). And regardless of the legal and logical relationship between sale and possession, VIBA's argument assumes that respondents were charged with selling and possessing *the same thing*. But that assumption is manifestly incorrect with respect to respondent Sánchez Valle: one of the charges ordered

dismissed by the decision below on double jeopardy grounds involves the unlawful sale of *ammunition*, *see* JA12, while the surviving charge against him involves the unlawful possession of a *firearm*, *see* JA13. Thus, even if VIBA were correct that an acquittal on the surviving *firearm*-related charge against Sánchez Valle might have preclusive effects on the dismissed *firearm*-related charge at issue here, VIBA has identified nothing in the record to suggest it would have any preclusive effect with respect to the distinct *ammunition*-related charge at issue here. Whether Sánchez Valle possessed any firearm is not essential or even relevant to his guilt or innocence on the dismissed ammunition-sale charge, and VIBA has not identified any defense respondents could plausibly raise that would cut across the firearm- and ammunition-related charges. *See, e.g., Bobby v. Bies*, 556 U.S. 825, 834-35 (2009); *Ashe v. Swenson*, 397 U.S. 436, 443-54 (1970).

CONCLUSION

For the foregoing reasons, this Court has jurisdiction over this case under 28 U.S.C. § 1258.

Respectfully submitted,

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In the Supreme Court of the United States

COMMONWEALTH OF PUERTO RICO, PETITIONER

v.

LUIS M. SANCHEZ VALLE, ET AL.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF PUERTO RICO

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether Puerto Rico and the United States are separate sovereigns for purposes of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution.

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In the Supreme Court of the United States

No. 15-108

COMMONWEALTH OF PUERTO RICO, PETITIONER

v.

LUIS M. SANCHEZ VALLE, ET AL.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF PUERTO RICO

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE UNITED STATES

This case presents the question whether Puerto Rico and the United States are separate sovereigns for purposes of the Double Jeopardy Clause. The Court's decision will affect how the federal government enforces federal criminal laws within Puerto Rico. It also may affect the federal government's defense of federal legislation and policies related to Puerto Rico across a broad range of substantive areas, including congressional representation, federal benefits, federal income taxes, bankruptcy, and defense. Accordingly, the United States has a substantial interest in this case.

STATEMENT

1. In 1898, Puerto Rico became a territory of the United States, when Spain ceded it to the United States at the conclusion of the Spanish-American War. See Treaty of Paris, Dec. 10, 1898, U.S.-Spain, Art. II,

30 Stat. 1755 (proclaimed Apr. 11, 1899). After a brief period of military government, Congress established a civilian government for Puerto Rico, Organic Act of 1900 (Foraker Act), ch. 191, §§ 17-35, 31 Stat. 81-85, consisting of an appointed governor and executive council, §§ 17-26, 31 Stat. 81-82; a legislature composed of the executive council and a popularly elected house of delegates, §§ 27-32, 31 Stat. 82-84; and a judiciary with an appointed supreme court and federal district court, §§ 33-35, 31 Stat. 84-85. Congress applied all federal laws (except internal revenue laws) "not locally inapplicable" to Puerto Rico, § 14, 31 Stat. 80, and gave the legislature broad authority over internal affairs, §§ 15, 32, 31 Stat. 80, 83-84.

In 1917, Congress provided a bill of rights for Puerto Rico and granted the people of Puerto Rico U.S. citizenship. See Organic Act of 1917 (Jones Act), ch. 145, §§ 2-5, 39 Stat. 951-953. It also reorganized Puerto Rico's government by establishing executive departments and authorizing a popularly elected senate to replace the executive council in the legislature. §§ 13, 26, 39 Stat. 955-956, 958-959. In 1947, Congress provided for a popularly elected governor, who would appoint the heads of most executive departments. See Act of Aug. 5, 1947, ch. 490, §§ 1-3, 61 Stat. 770-771.

In 1950, Congress authorized the people of Puerto Rico to "organize a government pursuant to a constitution of their own adoption." Act of July 5, 1950 (Public Law 600), ch. 446, § 1, 64 Stat. 319. Congress provided that the constitution must "provide a republican form of government" and "include a bill of rights" and that it must be approved by Congress to take effect. §§ 2-3, 64 Stat. 319.

Puerto Rico held a referendum, in which the people voted to call a constitutional convention to draft a constitution. See Act of July 3, 1952 (1952 Act), ch. 567, 66 Stat. 327; *Documents on the Constitutional Relationship of Puerto Rico and the United States* 178 (Marcos Ramirez Lavandero ed., 3d ed. 1988) (*Documents*). The constitution was approved by referendum. *Documents* 178-179. Congress made several changes to the constitution, then approved it. See 1952 Act, 66 Stat. 327. The constitutional convention approved the revised constitution, and it became law by proclamation of the governor. Proclamation by the Governor of Puerto Rico (July 25, 1952), *reprinted in Documents* 224; Resolution 34 of Constitutional Convention of Puerto Rico (July 10, 1952), *reprinted in Documents* 222-223. When the constitution became effective, the provisions of federal law through which Congress and the President had directly supervised the government of Puerto Rico were "deemed repealed" but other provisions were left intact. See Public Law 600, §§ 4-5, 64 Stat. 319-320 (provisions left intact renamed Puerto Rican Federal Relations Act).

Since 1952, Puerto Rico has enjoyed "a measure of autonomy comparable to that possessed by the States." *Examining Bd. of Eng'rs, Architects & Surveyors* v. *Flores de Otero*, 426 U.S. 572, 597 (1976). Puerto Rico's transition to local self-government was a significant development in its relationship with the United States, and it has yielded many benefits for Puerto Rico and the United States in a relationship of mutual respect. Congress has evinced no intention to revoke the local autonomy it has vested in the government of Puerto Rico. But as a constitutional mat-

ter, Puerto Rico remains a territory subject to Congress's authority under the Territory Clause. *Harris* v. *Rosario*, 446 U.S. 651, 651-652 (1980) (per curiam). Residents of Puerto Rico have voted several times on whether to seek a change in Puerto Rico's constitutional status but have not sought statehood or independence from the United States. *Report by the President's Task Force on Puerto Rico's Status* 19, 21 (Mar. 2011) (*2011 Task Force Report*); *Report by the President's Task Force on Puerto Rico's Status* 3-4 (Dec. 2007) (*2007 Task Force Report*).

2. Each respondent sold an illegal firearm to an undercover police officer. Pet. App. 307a, 330a. Puerto Rico prosecutors charged both of them with (*inter alia*) sale of a firearm without a license, in violation of P.R. Laws Ann. tit. 25, § 458 (2008). Pet. App. 2a-4a; see J.A. 11-14, 31-33. While the Puerto Rico prosecutions were pending, respondents were both convicted of federal offenses arising out of the same conduct. J.A. 21-22 (Sanchez Valle convicted of violating 18 U.S.C. 922(a)(1)(A), 923(a), 924(a)(1)(D), and 2); J.A. 40-43, 45 (Gomez Vasquez convicted of violating 18 U.S.C. 922(a)(1)(A) and 371).

3. Each respondent moved to dismiss his pending Puerto Rico charges on double jeopardy grounds. Pet. App. 3a, 5a. The trial court dismissed the charges. *Id.* at 307a-329a, 330a-352a. Puerto Rico had argued that it may prosecute respondents after the federal government because it is a separate sovereign for purposes of the Double Jeopardy Clause. *Id.* at 309a-310a, 332a-333a. The trial court rejected that argument, explaining that "the criminal laws of a territory emanate from the same power as the federal laws." *Id.* at 315a-316a, 338a.

4. The court of appeals consolidated the two cases and reversed. Pet. App. 243a-306a. The court concluded that Puerto Rico "is a sovereign" because "it has the power," by virtue of adopting its own constitution, "to create offenses different from those of the federal sovereignty." *Id.* at 263a-264a, 268a, 280a.

5. The Puerto Rico Supreme Court reversed. Pet. App. 1a-70a. It observed that "the determining factor for the doctrine of dual sovereignty to apply[] is the ultimate source of the power under which the indictments were undertaken"; "[i]f it is a power delegated by Congress, the doctrine of dual sovereignty does not apply." *Id.* at 19a-20a. The court explained that "Puerto Rico has never exercised an original or primary sovereignty" because it was a Spanish colony before it became a U.S. territory. *Id.* at 33a. Territorial governments, it reasoned, "exert all of their powers by authority of the United States." *Id.* at 23a (citation omitted). Congress's decision to permit local self-government, it concluded, does not make Puerto Rico a sovereign because "there was never a transfer of sovereignty, only a delegation of powers." *Id.* at 51a-52a.

Chief Justice Matta concurred, stating that she would rule for respondents under the Puerto Rico Constitution. Pet. App. 71a-190a. Justice Rodriguez Rodriguez dissented, arguing that Puerto Rico is a sovereign for federal constitutional purposes. *Id.* at 191a-242a.

SUMMARY OF ARGUMENT

Puerto Rico and the United States are not separate sovereigns for purposes of the Double Jeopardy Clause.

A. The Double Jeopardy Clause provides that a person may not be prosecuted twice for the "same offence." U.S. Const. Amend. V Two offenses are not the same if they are prosecuted by separate sovereigns. Whether an entity is a sovereign for double jeopardy purposes depends on "the ultimate source" of its authority to prosecute under the Constitution; if two entities derive their prosecutorial power from the same ultimate source, they are not separate sovereigns. *United States* v. *Wheeler*, 435 U.S. 313, 320 (1978).

B. The federal government, the States, and the Indian Tribes are all separate sovereigns for purposes of the Double Jeopardy Clause. The Framers "split the atom of sovereignty," *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring), in the federal Constitution. The United States attained sovereignty by winning the war for independence and adopting the Constitution, which conferred on the national government certain sovereign powers, see U.S. Const. Arts. I-III, while reserving others to the pre-existing sovereign States, U.S. Const. Amend. X. See *Thornton*, 514 U.S. at 838-840 (Kennedy, J, concurring). Consistent with the constitutional design, this Court has recognized that the Double Jeopardy Clause permits prosecutions by both a State and the federal government, or by two different States, because each is a sovereign with independent authority to proscribe conduct. See *Heath* v. *Ala-*

bama, 474 U.S. 82, 88 (1985); *United States* v. *Lanza*, 260 U.S. 377, 382 (1922).

The Indian Tribes also are sovereigns for purposes of the Double Jeopardy Clause. Although the Tribes' incorporation into the United States necessarily divested them of some aspects of sovereignty, they retain inherent sovereign authority to punish tribal offenders. Accordingly, the Constitution permits successive prosecutions in federal or state court and in tribal court. See *Wheeler*, 435 U.S. at 329-330.

C. United States territories are not sovereigns. The Constitution affords no independent political status to territories but instead confirms that they are under the sovereignty of the United States and subject to the plenary authority of Congress. See U.S. Const. Art. IV, § 3, Cl. 2. It has long been settled that "there is no sovereignty in a Territory of the United States but that of the United States itself." *Snow* v. *United States*, 85 U.S. (18 Wall.) 317, 321 (1873). The Court therefore has recognized that territories are not separate sovereigns under the Double Jeopardy Clause. See *Grafton* v. *United States*, 206 U.S. 333, 354-355 (1907). Puerto Rico is a U.S. territory, and it therefore is not a sovereign for double jeopardy purposes. See *Puerto Rico* v. *Shell Co.*, 302 U.S. 253, 264 (1937).

D. The events of 1950-1952 did not transform Puerto Rico into a sovereign. Before 1950, Congress had progressively authorized self-government in Puerto Rico. As a further step, in 1950 Congress permitted the people of Puerto Rico to adopt a constitution, which Congress approved with revisions in 1952.

Those events were of profound significance for the relationship between the United States and Puerto

Rico, but they did not alter Puerto Rico's constitutional status as a U.S. territory. The United States did not cede its sovereignty over Puerto Rico by admitting it as a State or granting it independence. Rather, Congress authorized Puerto Rico to exercise governance over local affairs. That arrangement can be revised by Congress, and federal and Puerto Rico officials understood that Puerto Rico's adoption of a constitution did not change its constitutional status. The ultimate source of sovereign power in Puerto Rico thus remains the United States.

None of petitioner's arguments establish that Puerto Rico is a sovereign for double jeopardy purposes. Congress did not enter into an irrevocable "compact" with Puerto Rico, and as a constitutional matter, Congress cannot irrevocably cede sovereignty to Puerto Rico while it remains a U.S. territory. The designation of Puerto Rico as a "commonwealth" reflects Puerto Rico's significant powers of self-government, but it does not denote a constitutional status. Puerto Rico's autonomy over local affairs does not itself make Puerto Rico a sovereign.

E. This Court has consistently recognized that although Puerto Rico is locally self-governing, it remains a U.S. territory under the Constitution. For example, because Puerto Rico is a territory, it has "no sovereign authority" that could justify a border search under the Fourth Amendment, see *Torres* v. *Puerto Rico*, 442 U.S. 465, 474 (1979), and Congress may treat Puerto Rico differently from the States in allocating federal benefits, see *Harris* v. *Rosario*, 446 U.S. 651, 651-652 (1980) (per curiam). None of this Court's decisions question Puerto Rico's constitutional

status as a territory or establish that it has all of the attributes of a State, including sovereignty.

The Executive Branch has recognized that Puerto Rico remains a U.S. territory subject to Congress's authority. A 1994 Office of Legal Counsel opinion explained that Congress may not create a sovereign territory consistent with the Constitution, and since then, the Department of Justice has repeatedly stated the same view to Congress in connection with proposed legislation about Puerto Rico. Presidential task force reports in 2005, 2007, and 2011 have likewise confirmed that Puerto Rico is not a sovereign and that it could become one only if it were to attain statehood or become an independent nation. Those principles confirm that Puerto Rico is not a separate sovereign for purposes of the Double Jeopardy Clause.

ARGUMENT

PUERTO RICO IS NOT A SOVEREIGN FOR PURPOSES OF THE DOUBLE JEOPARDY CLAUSE

In 1898, Puerto Rico became a territory of the United States. As such, it did not possess separate sovereignty for double jeopardy purposes. In 1950, Congress authorized Puerto Rico to adopt a constitution so that it could exercise local self-governance, and in 1952, Puerto Rico did so. The question in this case is whether those events transformed Puerto Rico into a sovereign for double jeopardy purposes. The answer is no. Puerto Rico exercises significant local autonomy, with great benefit to its people and to the United States. But it remains a territory under the sovereignty of the United States and subject to the plenary authority of Congress. This Court has recognized that U.S. territories, including Puerto Rico, are

not separate sovereigns for double jeopardy purposes, and that holding is controlling in this case.

A. The Dual Sovereignty Doctrine Requires Separate Ultimate Sources Of Authority To Prosecute

1. The Double Jeopardy Clause of the Fifth Amendment provides that a person may not "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. Amend. V The Fifth Amendment applies directly only to the federal government, but its protections have been incorporated against the States through the Due Process Clause of the Fourteenth Amendment. *Benton* v. *Maryland*, 395 U.S. 784, 794-796 (1969). The parties in this case agree that the Double Jeopardy Clause applies to Puerto Rico.[1]

Whether the Double Jeopardy Clause bars successive prosecutions depends on whether the two prosecutions are for the "same offence." Even if two crimes have the same set of elements, they are nonetheless distinct offenses if they are prosecuted by two different sovereigns. Because "the common-law conception of [a] crime" is "an offense against the sovereignty of

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[1] This Court has concluded that various constitutional provisions apply to Puerto Rico under either the Bill of Rights or as incorporated through the Fourteenth Amendment; it has declined to resolve which. *E.g.*, *Torres* v. *Puerto Rico*, 442 U.S. 465, 471 (1979). But the Double Jeopardy Clause could not apply to Puerto Rico through the Due Process Clause of the Fourteenth Amendment, because the Fourteenth Amendment applies only to "State[s]." U.S. Const. Amend. XIV, § 1. The Double Jeopardy Clause thus must apply to Puerto Rico based on its status as a territory belonging to the United States. The applicability of the Fifth Amendment—a limitation on federal power—makes clear that Puerto Rico is not a separate sovereign from the United States for double jeopardy purposes.

the government," "[w]hen a defendant in a single act violates the peace and dignity of two sovereigns by breaking the laws of each, he has committed two distinct 'offences'" and can be prosecuted for both. *Heath* v. *Alabama*, 474 U.S. 82, 88 (1985) (citation and internal quotation marks omitted). Each sovereign is entitled to "exercis[e] its own sovereignty" to "determin[e] what shall be an offense against its peace and dignity" and prosecute the offender "without interference by the other." *United States* v. *Lanza*, 260 U.S. 377, 382 (1922).

2. In determining whether the dual sovereignty doctrine applies, the "crucial determination" is whether the two prosecuting entities "can be termed separate sovereigns" under the federal Constitution. *Heath*, 474 U.S. at 88. Whether two entities are each sovereign for dual prosecution purposes depends on "whether the two entities draw their authority to punish the offender from distinct sources of power." *Ibid.* If two entities derive their authority to punish from the same ultimate source, the Double Jeopardy Clause bars them from bringing successive prosecutions for the same offense.

Determining whether an entity is a sovereign for double jeopardy purposes depends on a historical and constitutional analysis of the political status of the entity asserting sovereignty. *Heath*, 474 U.S. at 88-90. The ability of a government to enact and enforce its own laws does not make it a sovereign. *Waller* v. *Florida*, 397 U.S. 387, 393 (1970). Rather, the inquiry depends on whether "the *ultimate* source" of the entity's power to prosecute is its own sovereign power or power derived from another entity. *United States* v. *Wheeler*, 435 U.S. 313, 320 (1978) (emphasis added).

B. The Federal Government, States, And Indian Tribes Are Sovereigns For Purposes Of The Double Jeopardy Clause

Within the territory of the United States, the Constitution contemplates three sovereigns—the States, the United States, and the Indian Tribes. The Court has appropriately treated those entities, and only those entities, as domestic sovereigns under the Double Jeopardy Clause.

1. "The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other." *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring). Under our constitutional design, the federal government has certain enumerated powers, see U.S. Const. Arts. I-III, and the powers "not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States," U.S. Const. Amend. X. "[T]he States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause." *Tafflin* v. *Levitt*, 493 U.S. 455, 458 (1990).

Before the formation of the United States, States had their own "separate and independent sources of power and authority," and when they were admitted into the Union, their sovereign power was "preserved to them by the Tenth Amendment." *Heath*, 474 U.S. at 89; see U.S. Const. Amend. X. States "retain all the rights of sovereignty which they before had, and which were not, by that act, *exclusively* delegated to the United States." *Thornton*, 514 U.S. at 801 (quoting *The Federalist No. 32*, at 194 (Alexander Hamil-

ton) (E.H. Scott ed., 1898)); see, *e.g.*, *Gregory* v. *Ashcroft*, 501 U.S. 452, 461 (1991) ("States retain substantial sovereign powers under our constitutional scheme."). And the United States became a sovereign by winning independence from Great Britain and by the people's adoption, through the state ratifying conventions, of the Constitution. See *Thornton*, 514 U.S. at 839-841 (Kennedy, J., concurring); *United States* v. *Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 315-318 (1936); *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 403-405 (1819).

Consistent with the constitutional design, this Court has recognized that the Double Jeopardy Clause permits dual prosecutions by a State and the federal government because a State and the federal government are "two sovereignties, deriving power from different sources." *Lanza*, 260 U.S. at 382-384. This conclusion follows from "the basic structure of our federal system." *Wheeler*, 435 U.S. at 320; see *New York* v. *United States*, 505 U.S. 144, 162-163 (1992). And "States are no less sovereign with respect to each other than they are with respect to the Federal Government." *Heath*, 474 U.S. at 89; see *Coyle* v. *Oklahoma*, 221 U.S. 559, 567 (1911) (equal-footing doctrine). Accordingly, two States may prosecute a person for an offense over which they both have jurisdiction. *Heath*, 474 U.S. at 89-90.

2. The Indian Tribes also are sovereigns for purposes of the Double Jeopardy Clause. The Tribes possess inherent sovereignty that predates the Constitution. See *United States* v. *Lara*, 541 U.S. 193, 197 (2004); *Wheeler*, 435 U.S. at 322-323. Before the Founding of the United States, the Tribes were "self-governing sovereign political communities." *Wheeler*,

435 U.S. at 322-323. The Constitution recognizes the Tribes' sovereignty. See U.S. Const. Art. I, § 8, Cl. 3 (authorizing Congress to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes"); see also *id.* Art. VI, Cl. 2 (Treaty Clause); *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832) ("The [C]onstitution, by declaring treaties already made * * * to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations.").

With the formation of the United States, the Tribes within the United States became "domestic dependent nations." *Lara*, 541 U.S. at 204-205 (quoting *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831)). The Tribes continue to possess "those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status," including each Tribe's "sovereign power to punish tribal offenders." *Wheeler*, 435 U.S. at 323. Although Congress has plenary power to legislate with respect to the Tribes, that "does not mean that Congress is the source" of the Tribes' power to prosecute; that power derives from the Tribes' "inherent tribal sovereignty" and is "attributable in no way to any delegation * * * of federal authority." *Id.* at 322, 328. Accordingly, the Constitution permits successive prosecutions in tribal court and in federal or state court. See *Lara*, 541 U.S. at 197; *Wheeler*, 435 U.S. at 329-330.

3. The Court has confirmed that whether an entity is a "sovereign" for double jeopardy purposes does not depend simply on whether it has the authority to prosecute. "The 'dual sovereignty' concept does not apply * * * in every instance where successive cases

are brought by nominally different prosecuting entities." *Wheeler*, 435 U.S. at 318 (citation omitted). Rather, the "dual sovereignty" doctrine requires a constitutionally "distinct source[] of power" to govern. *Heath*, 474 U.S. at 88.

Consistent with that principle, the Court has held that dual prosecution by a State and its municipalities violates double jeopardy. Municipal governments, the Court has explained, are not sovereigns because they derive their power to prosecute from the States. See *Waller*, 397 U.S. at 391-394. "Political subdivisions of States" such as cities and counties "never were and never have been considered as sovereign entities," *id.* at 392 (citation omitted); they are "subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions," *Reynolds* v. *Sims*, 377 U.S. 533, 575 (1964). And critically here, as explained below, the Court has recognized that U.S. territories are not sovereigns for double jeopardy purposes because their power to prosecute ultimately derives from the United States, not from an inherent sovereignty.

C. Puerto Rico, As A U.S. Territory, Is Not A Sovereign For Double Jeopardy Purposes

1. The position of territories in the constitutional framework categorically differs from that of the federal government, the States, or the Indian Tribes.[2]

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[2] The following are United States territories: Puerto Rico, American Samoa, Guam, the Northern Mariana Islands, the U.S. Virgin Islands, and a number of small, mostly uninhabited outlying islands. See U.S. Dep't of State, *Dependencies and Areas of Special Sovereignty* (Nov. 29, 2011), http://www.state.gov/s/inr/rls/10543.htm; U.S. Gen. Accounting Office, *U.S. Insular Areas: Application of the U.S. Constitution* 6-10, 39-40 (Nov. 1997).

The Constitution neither recognizes nor affords independent sovereignty to territories but instead grants plenary authority to the United States: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. Art. IV, § 3, Cl. 2 (Territory Clause). As a constitutional matter, "[a]ll territory within the jurisdiction of the United States not included in any State must necessarily be governed by or under the authority of Congress" because territories are "political subdivisions of the outlying dominion of the United States." *National Bank* v. *County of Yankton*, 101 U.S. (11 Otto.) 129, 133 (1880).

The Constitution does not contemplate "sovereign territories." This Court has consistently recognized that "there is no sovereignty in a Territory of the United States but that of the United States itself." *Snow* v. *United States*, 85 U.S. (18 Wall.) 317, 321 (1873); see, *e.g.*, *Domenech* v. *National City Bank of N.Y.*, 294 U.S. 199, 204 (1935) (A U.S. territory has "no independent sovereignty comparable to that of a state."). That is because "the Government of [a territory] owes its existence wholly to the United States." *Grafton* v. *United States*, 206 U.S. 333, 354 (1907); see, *e.g.*, *Benner* v. *Porter*, 50 U.S. (9 How.) 235, 242 (1850) (Territories "are the creations, exclusively, of the legislative department, and subject to its supervision and control."). "In the Territories of the United States, Congress has the entire dominion and sovereignty, national and local, Federal and state, and has full legislative power over all subjects upon which the legislature of a State might legislate within the State." *Simms* v. *Simms*, 175 U.S. 162, 168 (1899); see *Shively*

v. *Bowlby*, 152 U.S. 1, 48 (1894) (citing numerous cases for the "well settled" proposition that the federal government has "the entire dominion and sovereignty * * * over all the territories").

Congress's plenary authority over federal territories includes the authority to permit self-government, whereby local officials administer a territory's internal affairs. *Simms*, 175 U.S. at 168 (Congress has "full legislative power" over the territories and "may, at its discretion, intrust that power to the legislative assembly of a Territory."). But when Congress does so, local officials exercise "power * * * conferred" on them, not any inherent sovereign power of the territory. *Ibid.* And "[t]he extent of the power thus granted" is up to Congress, "at all times subject to such alterations as Congress may see fit to adopt." *Snow*, 85 U.S. at 320.

2. Applying these principles in the double jeopardy context, the Court has held that U.S. territories are not sovereigns separate from the United States. "[S]uccessive prosecutions by federal and territorial courts are impermissible because such courts are creations emanating from the same sovereignty." *Wheeler*, 435 U.S. at 318 (citation and internal quotation marks omitted). That is because the "ultimate source" of a territorial government's power to prosecute is federal power: "[w]hen a territorial government enacts and enforces criminal laws to govern its inhabitants, it is not acting as an independent political community like a State, but as an agency of the federal government." *Id.* at 320-321 (internal quotation marks omitted).

Accordingly, in *Grafton* v. *United States*, *supra*, the Court held that the Philippine Islands (then a U.S.

territory) could not prosecute a defendant for murder after a federal acquittal for the same offense. Consistent with the Territory Clause, the Court recognized that the "authority of the United States over that territory and its inhabitants * * * is paramount." 206 U.S. at 354. The Court explained that territories are not like States, because "[t]he government of a State does not derive its powers from the United States," whereas the government of a territory does. *Ibid.* Because a territorial court and a federal court "exert all their powers under and by authority of the same government—that of the United States," the dual sovereignty doctrine "do[es] not apply." *Id.* at 355.

Since *Grafton*, the Court has consistently reaffirmed that U.S. territories are not sovereigns for double jeopardy purposes. In *Waller*, the Court remarked that "the apt analogy to the relationship between municipal and state governments is to be found in the relationship between the government of a Territory and the Government of the United States." 397 U.S. at 393. The Court explained that the "legal consequence" of the relationship between a territory and the United States "was settled in *Grafton*," where the Court "held that a prosecution in a court of the United States is a bar to a subsequent prosecution in a territorial court, since both are arms of the same sovereign." *Ibid.* Similarly, in *Wheeler*, the Court reaffirmed that a territory is not a sovereign separate from the United States for double jeopardy purposes because "a territorial government is entirely the creation of Congress" and "its judicial tribunals exert all their powers by authority of the United States." 435 U.S. at 321 (citation omitted). And in *Heath*, the

Court noted that the dual sovereignty doctrine is "inapplicable" to territories because territorial prosecutors and federal prosecutors "d[o] not derive their powers to prosecute from independent sources of authority." 474 U.S. at 90.

3. Puerto Rico is a United States territory. It has been since 1898, when Spain ceded it to the United States. See Treaty of Paris, Art. II, 30 Stat. 1755. Although Puerto Rico had significant autonomy before it became part of the United States, it was a Spanish colony, "under Spanish sovereignty." *Ibid.* And Puerto Rico did not become a sovereign when it came under United States jurisdiction, because it did so as a territory, not as a State. See Art. IX, 30 Stat. 1759 ("The civil rights and political status of the native inhabitants of" Puerto Rico "shall be determined by the Congress."). As a territory, Puerto Rico is subject to the "paramount" authority of Congress under the Territory Clause. *Grafton*, 206 U.S. at 354.

4. This Court has recognized that Puerto Rico is not a sovereign for double jeopardy purposes. *Puerto Rico* v. *Shell Co.*, 302 U.S. 253 (1937).[3] *Shell Co.* concerned whether the Sherman Act, 15 U.S.C. 1 *et seq.*, preempted a Puerto Rico antitrust law. 302 U.S. at 255-257. The Court held that it did not, noting that Congress gave Puerto Rico "broad" legislative authority to govern internal affairs and concluding that Puerto Rico's antitrust law did not conflict with federal antitrust law. *Id.* at 260-264.

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[3] In *Shell Co.*, the Court did not expressly address whether the Double Jeopardy Clause applies to Puerto Rico, likely because Congress had applied the double jeopardy protection to Puerto Rico by statute. See 302 U.S. at 264 n.2 (citing Jones Act § 2, 39 Stat. 951).

Despite recognizing that Congress had conferred on Puerto Rico "full power of local self-determination," the Court noted that "legislative duplication gives rise to no danger of a second prosecution and conviction" because territorial and federal antitrust prosecutors represent the same sovereign. *Shell Co.*, 302 U.S. at 261, 264. The "risk of double jeopardy does not exist" because "[b]oth the territorial and federal laws and the courts, whether exercising federal or local jurisdiction, are creations emanating from the same sovereignty." *Id.* at 264 (footnote omitted). Accordingly, "[p]rosecution under one of the laws in the appropriate court, necessarily, will bar a prosecution under the other law in another court." *Ibid.* Because Puerto Rico is a U.S. territory, the situation was "in all essentials, the same" as presented in *Grafton*. *Id.* at 265.

Petitioner contends (Br. 21 n.1, 24) that *Shell Co.* is not controlling because, it asserts, the double jeopardy discussion is dicta. But the Court's double jeopardy analysis formed a critical part of the Court's explanation of why Puerto Rico's antitrust law was not preempted. See 302 U.S. at 265. And *Grafton*'s determination that a U.S. territory is not a sovereign for double jeopardy purposes, on which *Shell Co.* relied, is unquestionably a holding of the Court.

Petitioner also contends (Br. 28) that while Puerto Rico may have exercised delegated federal authority at the time of *Shell Co.*, the double jeopardy analysis changed upon "the adoption of the Puerto Rican Constitution in 1952." As explained below, however, although Puerto Rico attained a significant measure of autonomous self-government when, with Congress's approval, it adopted a constitution in 1952, that event

did not alter Puerto Rico's constitutional status as a U.S. territory.

D. Puerto Rico's Transition To Local Self-Government In 1952 Did Not Make It A Sovereign

1. The events of 1950-1952 marked an important evolution in the relationship between Puerto Rico and the United States. Before 1950, Congress had "progressively recognized the right of self-government of the people of Puerto Rico" and, as a result, "an increasingly large measure of self-government ha[d] been achieved." Public Law 600, Pmbl., 64 Stat. 319. But Puerto Rico's people desired greater internal autonomy, and so Congress invited the drafting of a constitution so that Puerto Rico could become locally self-governing. *Ibid.*; § 1, 64 Stat. 319. The people of Puerto Rico accepted that invitation and drafted a constitution, which was ultimately approved by Congress. 1952 Act, 66 Stat. 327. As a result, Puerto Rico now exercises a high degree of autonomy.

Puerto Rico's transition to self-government did not change its constitutional status as a U.S. territory. The United States did not cede its sovereignty over Puerto Rico, and Puerto Rico did not become a State or an independent nation. *2007 Task Force Report* 5-8; see pp. 22-25, *infra*. Rather, Congress, in an exercise of its authority under the Territory Clause, authorized Puerto Rico to pursue self-government, under which local officials would exercise power under a framework approved by Congress.[4] Although Public

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[4] Petitioner asserts (Pet. 30-31) that Puerto Rico officials cannot be exercising power delegated by Congress because Congress and the President do not participate in the enactment or enforcement of Puerto Rico's criminal law. But Congress, when exercising

Law 600 granted the people of Puerto Rico an unprecedented amount of control over internal affairs, it did not change Puerto Rico's status under the U.S. Constitution.

Puerto Rico's authority to issue its constitution emanated from Congress, and the constitution could not become effective without congressional approval. See Public Law 600, § 3, 64 Stat. 319. Congress did not accept the constitution as drafted. Instead, it deleted Section 20 of Article II of the proposed constitution (which included rights to obtain work; to food, clothing, housing and medical care; and to protection in sickness, old age or disability) and it prevented Puerto Rico from restoring those provisions later. See 1952 Act, 66 Stat. 327 (requiring language specifying that any amendment or revision of the constitution must be consistent with, *inter alia*, Congress's approving resolution); see also Resp. Br. App. 1. Congress's oversight of Puerto Rico's transition to local self-government is consistent with Puerto Rico's status as a territory; it is not consistent with sovereignty.

2. Federal and Puerto Rico officials understood that Puerto Rico's adoption of a constitution would not change its status under the federal Constitution. The

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plenary authority under the Territory Clause, may empower elected territorial governments to exercise significant authority in ways that would not be permitted outside of the territories. See *Palmore* v. *United States*, 411 U.S. 389, 398 (1973) (Congress may legislate for the territories "in a manner * * * that would exceed its powers, or at least would be very unusual, in the context of national legislation enacted under other powers delegated to it."); *National Bank*, 101 U.S. at 133 (In the U.S. territories, "Congress is supreme" and "has all the powers of the people of the United States, except such as have been expressly or by implication reserved in the prohibitions of the Constitution.").

congressional reports accompanying Public Law 600 explained that Congress permitted the people of Puerto Rico "to assume greater responsibilities of local self-government" as part of Congress's "administration of Territories under the sovereignty of the United States," H.R. Rep. No. 2275, 81st Cong., 2d Sess. 4 (1950) (*1950 House Report*), but also that Public Law 600 "is not a statehood bill" or "an independence bill," S. Rep. No. 1779, 81st Cong., 2d Sess. 4 (1950) (*1950 Senate Report*). The reports made clear that authorizing Puerto Rico to adopt a constitution "would not change Puerto Rico's fundamental political, social and economic relationship to the United States" and would not commit the United States to statehood for Puerto Rico or "preclude a future determination by the Congress of Puerto Rico's ultimate political status." *1950 House Report* 3; see *1950 Senate Report* 3-4.

The Secretary of the Interior confirmed that Public Law 600 "would not change Puerto Rico's political, social, and economic relationship to the United States" or "preclude a future determination by Congress of Puerto Rico's ultimate political status." *Puerto Rico Constitution: Hearings Before the House Comm. on Public Lands*, 81st Cong. 163-164 (1950) (*1950 Hearings*); see *1950 House Report* 5 (same). Puerto Rico's Resident Commissioner (its non-voting representative in Congress) agreed that the legislation "would not change the status of the island of Puerto Rico relative to the United States" and "would not alter the powers of sovereignty acquired by the United States over Puerto Rico under the terms of the Treaty of Paris." *1950 Hearings* 63. The Governor of Puerto Rico likewise acknowledged that "Congress can always get

around and legislate again" if it does not approve of Puerto Rico's self-government. *Id.* at 33.

When Congress approved the constitution, the accompanying reports reaffirmed that such approval "w[ould] not change Puerto Rico's fundamental political, social, and economic relationship to the United States," H.R. Rep. No. 1832, 82d Cong., 2d Sess. 7 (1952), and would "in no way impair[]" "the exercise of Federal authority in Puerto Rico," S. Rep. No. 1720, 82d Cong., 2d Sess. 6 (1952) (*1952 Senate Report*). Puerto Rico would not become "a State of the United States" or "an independent republic," but instead simply would "exercise self-government" over "local matters." *1952 Senate Report* 6-7.

3. Petitioner contends (Br. 17, 29, 40-43) that the 1950 and 1952 legislation formed a "compact" between Puerto Rico and the United States that cannot be modified unilaterally by Congress. That argument places unjustified weight on Congress's description of Public Law 600 as "in the nature of a compact." § 1, 64 Stat. 319. That language signifies that the process set out in Public Law 600 would take effect only if the people of Puerto Rico chose local self-government and only if they agreed to adopt a constitution in accordance with the process and conditions set out by Congress. §§ 2-3, 64 Stat. 319. The "compact" was an agreement that Congress would permit self-government if the people of Puerto Rico drafted a constitution and Congress approved it. *1950 Senate Report* 2. Congress did not purport to cede authority over Puerto Rico or be bound by the terms of Public Law 600 for all time. Instead, Congress retained the authority to approve or disapprove the constitution and reaffirmed that it could legislate for Puerto Rico

in the future. Public Law 600, §§ 3-5, 64 Stat. 319-320; see *1950 House Report* 3; *1950 Senate Report* 3-4.

More fundamentally, Congress cannot irrevocably cede sovereignty to Puerto Rico while it remains a U.S. territory. A U.S. territory, by definition, is subject to the authority of Congress, see U.S. Const. Art. IV, § 3, Cl. 2, and one Congress cannot divest a future Congress of its constitutional power to administer that territory. This Court has long recognized that one Congress cannot bind a later Congress, which remains free to repeal or modify an earlier statute. See, *e.g.*, *Reichelderfer* v. *Quinn*, 287 U.S. 315, 318 (1932) (citing cases); see also *Fletcher* v. *Peck*, 10 U.S. (6 Cranch) 87, 135 (1810) ("[O]ne legislature cannot abridge the powers of a succeeding legislature."). That is because the people of the United States have conferred power on Congress through the Constitution, and Congress cannot irrevocably delegate that power consistent with the constitutional plan. See *Clinton* v. *City of New York*, 524 U.S. 417, 452 (1998) (Kennedy, J., concurring).

Petitioner observes (Br. 41-42) that Congress could irrevocably cede authority over Puerto Rico by allowing it to become a State or gain independence. That is true. But Congress cannot cede sovereignty while Puerto Rico remains a U.S. territory. While nothing suggests that Congress intends to revoke its authorization of self-government in Puerto Rico, its power to do so is incompatible with Puerto Rico's characterization of itself as a sovereign.

4. Petitioner points (Br. 29-30) to language in the Puerto Rico Constitution that, in its view, established that the people of Puerto Rico exercised their own sovereignty in adopting the constitution. See, *e.g.*,

P.R. Const. Pmbl., Art. I, §§ 1-2, Art. IV, § 18. But Puerto Rico cannot become a sovereign while remaining a U.S. territory. The constitution's language recognizes that Congress has vested in Puerto Rico the power to govern its internal affairs, which Puerto Rico does in accordance with the will of the people. Pet. App. 51a. Statements that the power of the government is derived from the people are characteristic of any democratic government; they do not answer the question whether the political entity representing the people is sovereign.

Nor does Puerto Rico's designation as a commonwealth change its constitutional status. See Pet. Br. 38. The term "commonwealth" was chosen by the people of Puerto Rico to reflect the "significant powers of self-government Puerto Rico enjoys," and it "appropriately captures Puerto Rico's special relationship with the United States." *2007 Task Force Report* 5. But "commonwealth" is not a form of independent sovereignty recognized under the U.S. Constitution. *Ibid.* (Puerto Rico's designation as a commonwealth "does not * * * describe a *legal* status different from Puerto Rico's constitutional status as a 'territory.'"). As the constitutional convention explained, Puerto Rico's designation as a "commonwealth" means that it is a governmental entity that regulates "its own local affairs" but "is linked to the United States of America * * * in a manner compatible with its Federal structure" and "does not have an independent and separate existence." Resolution 22 (Feb. 4, 1952), *reprinted in Documents* 191-192.

The exercise of local self-governance does not denote a sovereign status under the Constitution. See Pet. Br. 30-34. Congress has permitted home rule in

the District of Columbia, but the District is unequivocally subject to plenary congressional control, under the sovereignty of the United States. See *District of Columbia* v. *John R. Thompson Co.*, 346 U.S. 100, 109 (1953) (D.C. home rule, like "the delegation of [the] power[] of self-government * * * to territories," remains subject to "the power of Congress at any time to revise, alter, or revoke the authority granted."). Some States have authorized municipal home rule, see Resp. Br. 24-25, yet municipalities remain under the sovereignty of the States, *Waller*, 397 U.S. at 391-394. Whether two entities are separate sovereigns does not turn on "the extent of control exercised by one prosecuting authority over the other," *Wheeler*, 435 U.S. at 320, but on whether the entities "can be termed separate sovereigns" based on their political status under the Constitution, *Heath*, 474 U.S. at 88. Puerto Rico's legislative power is the immediate source of the laws that it uses to prosecute crimes, but not the "ultimate source," *Wheeler*, 435 U.S. at 320—the ultimate source is the United States.

E. This Court And The Executive Branch Have Recognized That Puerto Rico Is A Self-Governing U.S. Territory, Not A Sovereign

1. Since 1952, this Court has recognized both that Puerto Rico is locally self-governing and that Puerto Rico remains a territory for constitutional purposes. The Court has observed that Puerto Rico exercises a "degree of autonomy and independence normally associated with States of the Union." *Examining Bd. of Eng'rs, Architects & Surveyors* v. *Flores de Otero*, 426 U.S. 572, 594 (1976); see, *e.g.*, *Puerto Rico* v. *Branstad*, 483 U.S. 219, 230 (1987) (same). At the same time, the Court has recognized that Puerto Rico

remains a territory of the United States and does not have the same constitutional status as a State.

In *Torres* v. *Puerto Rico*, 442 U.S. 465 (1979), the Court considered a Fourth Amendment challenge to a police search of luggage. The Court noted that the Fourth Amendment does not automatically apply to Puerto Rico because it is an "unincorporated territor[y]" that is subject to Congress's authority, rather than a State. *Id.* at 469-471. After deciding to apply Fourth Amendment protections to Puerto Rico, the Court found the search impermissible, in part because "Puerto Rico has no sovereign authority to prohibit entry into its territory" and so the search could not qualify as a border search. *Id.* at 473. Similarly, in *Harris* v. *Rosario*, 446 U.S. 651 (1980) (per curiam), the Court rejected an equal-protection challenge to a federal law providing less favorable federal financial assistance for Puerto Rico than the States, explaining that Congress "may treat Puerto Rico differently from States" by virtue of Congress's power under the Territory Clause. *Id.* at 651-652.

Most relevant here, the Court has recognized that its double jeopardy analysis in *Shell Co.* remains good law after 1952. *Shell Co.* recognized that autonomy over local affairs did not make Puerto Rico a sovereign. Even before Puerto Rico adopted a constitution in 1952, it had significant autonomy. The 1900 and 1917 organic acts provided a "broad and comprehensive" grant of legislative power to Puerto Rico, giving it "full power of local self-determination," yet *Shell Co.* recognized that Puerto Rico remained a territory and therefore was not a separate sovereign for double jeopardy purposes. 302 U.S. at 261, 264. Puerto Rico's transition to self-government in 1952 did not

change its constitutional status as a U.S. territory. Since 1952, the Court has reaffirmed the general proposition that territories are not sovereigns for double jeopardy purposes. See *Heath*, 474 U.S. at 89-90; *Wheeler*, 435 U.S. at 318; *Waller*, 397 U.S. at 393. And the Court has continued to rely on *Shell Co.* for the proposition that territories are not sovereigns under the Double Jeopardy Clause. See *Heath*, 474 U.S. at 88-89; *Wheeler*, 435 U.S. at 318; *Waller*, 397 U.S. at 393 & n.5. This Court therefore has established that territories in general, and Puerto Rico in particular, are not sovereigns for double jeopardy purposes.

2. None of the decisions petitioner cites (Br. 35-39) establish that Puerto Rico is a sovereign under the Constitution. In *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974), the Court treated Puerto Rico like a State for purposes of a federal judicial statute. *Id.* at 669-676. Similarly, in *Flores de Otero*, the Court treated Puerto Rico like a State for a district-court jurisdictional statute, in part because Congress has "granted Puerto Rico a measure of autonomy comparable to that possessed by the States." 426 U.S. at 594, 596-597. In neither case was the Court called upon to assess Puerto Rico's status under the Constitution. The Court has treated Puerto Rico as a State for statutory purposes in some cases, see, *e.g.*, *Puerto Rico Dep't of Consumer Affairs* v. *Isla Petroleum Corp.*, 485 U.S. 495, 499 (1988), but not others, see *Fornaris* v. *Ridge Tool Co.*, 400 U.S. 41, 42 n.1 (1970) (per curiam), and it has "never held that the Commonwealth of Puerto Rico is entitled to all the benefits conferred upon the States under the Constitution," *Branstad*, 483 U.S. at 229.

In *Rodriguez* v. *Popular Democratic Party*, 457 U.S. 1 (1982), the Court upheld Puerto Rico's mechanism for filling vacancies in its legislature against a constitutional challenge. In so holding, the Court remarked that Puerto Rico, "like a state, is an autonomous political entity, sovereign over matters not ruled by the Constitution." *Id.* at 8 (quoting *Calero-Toledo*, 416 U.S. at 673) (citation and internal quotation marks omitted). But territorial status *is* ruled by the Constitution. *Rodriguez* recognized that because Puerto Rico is self-governing in its internal affairs, its arrangements for its electoral system should be given deference. *Ibid.* That holding does not question that, as a territory, Puerto Rico is not a separate sovereign from the United States.

Finally, the Court's decision in *Lara* does not establish that Puerto Rico is a sovereign. See Pet. Br. 33-34. In deciding that Congress could lift restrictions on Indian Tribes' authority to prosecute non-member Indians, the Court noted that Congress had "made adjustments to the autonomous status of other such dependent entities," and it cited Public Law 600, the Puerto Rico Constitution, and other laws governing territories. *Lara*, 541 U.S. at 203-204. But Congress's adjustment of the relationship with Puerto Rico by permitting self-government did not cede its sovereignty over Puerto Rico, and *Lara* does not state otherwise. Puerto Rico is not like the Tribes because it did not have pre-existing sovereignty when it became part of the United States. Nor did it acquire sovereignty upon its entry (as do States). The Tribes are sui generis, and the Court has so recognized. Territories are different because the Constitution places them under

U.S. sovereignty and subjects them to congressional control.

3. In a series of reports issued over two decades, the Executive Branch has rejected the view that Puerto Rico is, or could become, a sovereign territory. A 1994 Office of Legal Counsel opinion concluded that Congress may not cede sovereignty to a U.S. territory, absent statehood or independence, because all land under the sovereignty of the United States that is not a State is subject to "the authority of Congress," and Congress may not irrevocably delegate its authority over such land. Teresa Wynn Roseborough, Deputy Assistant Att'y Gen., Office of Legal Counsel, *Mutual Consent Provisions in the Guam Commonwealth Legislation* 1-6 (July 28, 1994), *reprinted in Report by the President's Task Force on Puerto Rico's Status* App. F (Dec. 2005) (*2005 Task Force Report*).[5]

The Department of Justice has adhered to that view in subsequent statements to Congress made in conjunction with proposed legislation about Puerto Rico. See *Puerto Rico: Hearing Before the Senate Comm. on Energy and Natural Resources*, 109th Cong., 2d Sess. 14-17 (2006) (statement of C. Kevin Marshall, Deputy Assistant Att'y Gen., Office of Legal

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[5] Five decades ago, an Office of Legal Counsel opinion expressed the view that the United States could enter into an agreement with Puerto Rico alterable only by mutual consent, see *Power of the United States To Conclude with the Commonwealth of Puerto Rico a Compact Which Could Be Modified Only by Mutual Consent* 1, 3-6 (July 23, 1963), and it relied on that opinion in another matter, see Herman Marcuse, *Micronesian Negotiations* 1 (Aug. 13, 1971). Neither opinion took the view that Puerto Rico is a sovereign, and the Office of Legal Counsel has since explained why its 1963 opinion was mistaken, see, *e.g.*, *2005 Task Force Report* App. F 6-10.

Counsel) (*2006 OLC Testimony*); Letter from Robert Raben, Assistant Att'y Gen., Office of Legislative Affairs, Dep't of Justice, to Hon. Frank H. Murkowski, Chairman, Comm. on Energy & Natural Res., U.S. Senate 5-10, 14 (Jan. 18, 2001), *reprinted in 2007 Task Force Report* App. E (*OLA Letter*); Comm. on Resources, 107th Cong., 1st Sess. 17, *Hearing on H.R. 4751, Puerto Rico-United States Bilateral Pact of Non-territorial Permanent Union and Guaranteed Citizenship Act* (Comm. Print 2000) (statement of William M. Treanor, Deputy Assistant Att'y Gen., Office of Legal Counsel) (*2000 OLC Testimony*). On each occasion, the Department explained that the "Constitution recognizes only a limited number of options" for Puerto Rico—it could become "a sovereign nation," become "a State," or "be governed pursuant to the Territories Clause"—and if it remains a territory, it "necessarily remain[s] subject to Congressional power under the Territories Clause." *2000 OLC Testimony* 17-18; see *2006 OLC Testimony* 14-17; *OLA Letter* 5-10, 14.[6]

A Presidential task force has assessed Puerto Rico's current status and evaluated the options for Puerto Rico's future. After considering views from across the government, holding public hearings, and receiving written submissions, the task force concluded on

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[6] In briefs filed two decades ago, the Department of Justice argued that Puerto Rico was a separate sovereign for double jeopardy purposes. Compare, *e.g.*, *United States* v. *Lopez Andino*, 831 F.2d 1164, 1167-1168 (1st Cir. 1987) (agreeing with that position), cert. denied, 108 S. Ct. 2018 (1988), with *United States* v. *Sanchez*, 992 F.2d 1143, 1148-1152 (11th Cir. 1993) (rejecting that position), cert. denied, 510 U.S. 1110 (1994). Those briefs do not reflect the considered view of the Executive Branch.

three different occasions that Puerto Rico remains a territory of the United States and that Congress has not irrevocably ceded sovereignty to it.

The task force's 2005 report explained that "Puerto Rico is, for purposes under the U.S. Constitution, a territory," and therefore is "subject to congressional authority, under the Constitution's Territory Clause." *2005 Task Force Report* 5 (internal quotation marks omitted). Congress could "continue the current system indefinitely, but it also may revise or revoke it at any time," and Congress cannot enter into an arrangement with Puerto Rico that "could not be altered without the 'mutual consent' of Puerto Rico and the [F]ederal Government." *Id.* at 5-6. "The Federal Government may relinquish United States sovereignty by granting independence or ceding the territory to another nation; or it may * * * admit a territory as a State," but "the U.S. Constitution does not allow other options." *Id.* at 6. In 2007 and 2011, the task force took "a fresh look at the issue" and reached the same conclusion. *2011 Task Force Report* 24-26; see *2007 Task Force Report* 5-7.[7]

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[7] Petitioner relies (Br. 37-38) on statements that the United States made to the United Nations when Puerto Rico's constitution became effective. In accordance with Article 73(e) of the U.N. Charter, which directs member states to transmit information to the U.N. about territories that have not yet attained self-government, the United States transmitted information about Puerto Rico from 1946 to 1952. Then, in 1953, it reported that it would no longer transmit such information because Puerto Rico had become self-governing. *Memorandum by the Government of the United States of America Concerning the Cessation of Transmission of Information Under Article 73(e) of the Charter with Regard to the Commonwealth of Puerto Rico*, 28 Dep't of State Bull. 585 (Apr. 20, 1953). The United States did not characterize

* * * * *

Although Puerto Rico exercises significant local authority, with great benefit to its people and to the United States, Puerto Rico remains a territory under our constitutional system. Puerto Rico does not possess sovereignty independent of the United States, and its prosecutions cannot invoke the dual sovereignty doctrine under the Double Jeopardy Clause.

CONCLUSION

The judgment of the Supreme Court of Puerto Rico should be affirmed.

Respectfully submitted.

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Puerto Rico as a sovereign. Instead, it noted that Puerto Rico had become self-governing while having no "independent and separate existence" from the United States. *Id.* at 587 (quoting Resolution 22 of the Constitutional Convention of Puerto Rico (Feb. 4, 1952)).

No. 15-108

In the Supreme Court of the United States

THE COMMONWEALTH OF PUERTO RICO,
Petitioner,

v.

LUIS M. SANCHEZ VALLE AND JAIME GOMEZ VAZQUEZ,
Respondents.

On Writ of Certiorari to the Supreme Court of Puerto Rico

BRIEF OF COLEGIO DE ABOGADOS Y ABOGADAS DE PUERTO RICO AND THE PUERTO RICAN BAR ASSOCIATION, INC., AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF OF COLEGIO DE ABOGADOS Y ABOGADAS DE PUERTO RICO AND THE PUERTO RICAN BAR ASSOCIATION, INC., AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTRODUCTION AND INTEREST OF THE *AMICI CURIAE*[1]

The Constitution is the supreme law of the Nation. But for more than three million U.S. citizens who live in Puerto Rico, only portions of our foundational document apply.

Pursuant to the *Insular Cases*—a series of decisions by this Court dating from 1901—Puerto Rico is undeserving of the full panoply of constitutional rights because the island is "inhabited by alien races, differing from us" (*Downes* v. *Bidwell*, 182 U.S. 244, 287 (1901)). That holding reflects views from a bygone era. But while the views have long since disappeared from mainstream American thought, this Court's racially motivated precedents remain in force, limiting the rights of millions of U.S. citizens living in the territories.

The Colegio de Abogados y Abogadas de Puerto Rico (also known as the Puerto Rico Bar Association) (the "Colegio"), founded in 1840, is the oldest professional organization in Puerto Rico and the Caribbe-

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. Counsel of record for the petitioner and the respondents have both filed blanket consents to the filing of *amicus curiae* briefs with the Clerk of this Court.

an. The Colegio represents approximately 5,000 active attorneys in Puerto Rico.

Since its founding, the Colegio has advocated for the civil and political rights of Puerto Ricans. It has frequently grappled with difficult questions regarding the relationship between Puerto Rico and the federal government and has adopted a series of resolutions asserting the right of Puerto Ricans to control their own status and political destiny through a constitutional process of self-determination.[2] A series of the Colegio's presidents, including current president Mark Anthony Bimbela, have testified before the United Nations on the need for decolonialization.[3]

The Puerto Rican Bar Association, Inc. ("PRBA") was founded at a time of rapid political and social

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[2] See Resol. No. 4, Asamblea General, Colegio de Abogados de Puerto Rico, Sept. 9, 2006; Resol. No. 5, Junta de Gobierno, Colegio de Abogados de Puerto Rico, Oct. 28, 2006; Resol. No. 12, Junta de Gobierno, Colegio de Abogados de Puerto Rico, Oct. 6, 2001; Resol. No. 13, Junta de Gobierno, Colegio de Abogados de Puerto Rico, Feb. 27, 2010; Resol. No. 14, Junta de Gobierno, Colegio de Abogados de Puerto Rico, July 20, 1985; Resol. No. 14, Junta de Gobierno, Colegio de Abogados de Puerto Rico, Oct. 20, 2007; Resol. No. 16, Asamblea General, Colegio de Abogados de Puerto Rico, Sept. 13, 1986; Resol. No. 29, Junta de Gobierno, Colegio de Abogados de Puerto Rico, Jan. 19, 2008; Resol. No. 37, Junta de Gobierno, Colegio de Abogados de Puerto Rico, Aug. 23, 2008; Resol. No. 38, Junta de Gobierno, Colegio de Abogados de Puerto Rico, Jan. 28, 2006; Resol. No. 55, Junta de Gobierno, Colegio de Abogados de Puerto Rico, Aug. 19, 2006.

[3] See, *e.g.*, United Nations Gen. Assembly Special Comm. on Decolonization, *Crippling Trade Policies, Brain Drain, Sluggish Economy Constrain Puerto Rico's Progress, Petitioners Tell Decolonization Committee as Session Resumes*, June 22, 2015, http://www.un.org/press/en/2015/gacol3281.doc.htm.

change for Puerto Ricans living in Puerto Rico and elsewhere. Puerto Rican nationalism was suppressed by the Gag Law of 1948, P.R. Law No. 53 (1948), which criminalized expressive acts such as the possession of Puerto Rican flags. Efforts to invalidate the Gag Law under the First Amendment were unsuccessful, and the law remained in effect until it was repealed in 1957. That same year, a group of Puerto Rican and Latino attorneys in New York began gathering socially to offer each other personal and professional support in an era when it was difficult for Puerto Rican and Latino attorneys to be accepted as members in established bar associations.

Today, the PRBA is one of the largest and oldest ethnic bar associations in New York State, representing attorneys, judges, law professors and students who share a common interest in fostering professional development and addressing issues that are important to the Puerto Rican and other Latino communities.

This case is of particular importance to the *amici* because it implicates the political and legal relationship between Puerto Rico and the federal government. The case arises in the context of the dual-sovereign exception to the Double Jeopardy Clause, but any decision bearing on Puerto Rico's position in our federal system could have broader implications for Puerto Rico.

Amici submit this brief to familiarize the Court with the sordid history of the *Insular Cases* and their lasting impact on Puerto Rico. This Court should resist relying on the *Insular Cases* to resolve the instant dispute. In the proper case, the Court should reconsider the *Insular Cases* and should overrule them.

SUMMARY OF ARGUMENT

Over a century ago, in the wake of the Spanish-American War, this Court issued a series of decisions, now known collectively as the *Insular Cases*, in which it addressed the question whether and to what extent the Constitution applied, of its own force, in the territories that the United States had acquired in the conflict. The Court held that these territories, though part of the United States, had not been "incorporated" into the United States for constitutional purposes and that most provisions of the Constitution thus did not apply to their residents.

In this case, which presents the question whether Puerto Rico is a separate sovereign from the United States for purposes of the Double Jeopardy Clause, this Court may be inclined to look to the *Insular Cases* for guidance. But it need not and should not do so. The *Insular Cases* reflect badly outdated theories of imperialism and racial inferiority and have outlived their usefulness.

A.

The *Insular Cases* were decided during a heated national debate over how to govern the territories acquired by the United States in the Spanish-American War. Some Americans argued that the Constitution would apply in full to the new territories and lamented the consequences that would result. Others contended that the territories could and should be treated as colonies whose residents would not enjoy constitutional rights. The *Insular Cases* ultimately split the difference between these two positions, holding that the newly acquired lands were unincorporated territories where the Constitution would not fully apply without further congressional

action. This doctrine rests on assumptions that the Nation has long since rejected: namely, that U.S. citizens born in Puerto Rico are inferior to citizens born on the mainland and unready for free government, and that the United States therefore has the power to deny them equal rights and protection.

B.

The effects of the *Insular Cases* and their doctrine of "unincorporated" territories are still felt today. Though certain constitutional rights have been held to extend to Puerto Ricans and other territorial residents, many others have not. For example, residents of the territories do not enjoy the same right to a jury trial in criminal cases that the Sixth Amendment guarantees to other U.S. citizens. The *Insular Cases* have also helped give rise to a highly deferential form of equal protection jurisprudence, under which Congress is generally free to disadvantage Puerto Rico in allocating economic benefits. In these and other ways, the *Insular Cases* continue to deny Puerto Ricans full constitutional rights and perpetuate the colonial status of the territories.

C.

When presented with the appropriate opportunity, this Court should overrule the *Insular Cases*, whose imperialist reasoning is no longer tenable, and affirm that under the Constitution, U.S. citizens who live in the territories are entitled to the same civil rights as other U.S. citizens. And in *this* case, the Court should not rely upon the *Insular Cases*. Nor need it do so. Whatever the scope of Puerto Rico's authority under the Puerto Rico Federal Relations Act of 1950, Pub. L. No. 81-600, 64 Stat. 319, and its progeny, a territory is not a separate sovereign from

the United States, whether it is "incorporated" or "unincorporated"; thus, the *Insular Cases* should not form the basis for this Court's resolution of the question presented.

ARGUMENT

A. The *Insular Cases* Are Based On Political And Social Beliefs That Have Long Since Been Rejected.

1. The Roots Of The Insular Cases *Were In Misguided Racial And Imperialist Ideas*

a. In the 1898 Treaty of Paris, which ended the Spanish-American War, the United States acquired Puerto Rico, the Philippines, and Guam from Spain.[4] This territorial expansion brought with it thorny legal and political questions. How were the new territories to be governed? Were they to be put on a path to statehood, or simply maintained in a state of perpetual dependency? And what legal rights would their inhabitants enjoy?

The "guns were barely silenced when a national debate ensued" over these very questions. Juan R. Torruella, *Ruling America's Colonies: The* Insular Cases, 32 Yale L. & Pol'y Rev. 57, 65 (2013). That debate was especially lively in the legal community. In a series of articles published in the *Harvard Law Review* in 1898 and 1899, some of the leading scholars of the day put forth differing theories regarding whether and how the Constitution applied in the newly acquired territories. Their ideas had "para-

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[4] The Treaty also allowed the United States to occupy Cuba, which was made an independent state. See Treaty of Paris art. 1, U.S.-Sp., Dec. 10, 1898, http://avalon.law.yale.edu/19th_century/sp1898.asp.

mount influence" on the way in which this Court subsequently resolved the issue. *Ibid.*; see also Efren Rivera Ramos, *The* Insular Cases*: What Is There to Reconsider?*, in Reconsidering the Insular Cases: The Past and Future of the American Empire 29, 29 (Gerald L. Neuman & Tomiko Brown-Nagin eds., 2015).

b. One view, advocated by professors Carman Randolph of Columbia and Simeon Baldwin of Yale, posited that the Constitution applied, of its own force and in its entirety, in every place subject to the sovereignty of the United States, including the newly acquired territories.

"The Constitution," Randolph argued, "is a self-extending law, and so far as it covers our present possessions must cover future ones." Carman F. Randolph, *Constitutional Aspects of Annexation*, 12 Harv. L. Rev. 291, 306 (1898). He concluded that as a result, U.S. citizens outside the states "possess the same personal and property rights that the people of the States enjoy." *Id.* at 302. Baldwin agreed with this view, stating that "the Constitution is the supreme law wherever the flag of the Union floats over its soil." Simeon E. Baldwin, *The Constitutional Questions Incident to the Acquisition and Government by the United States of Island Territory*, 12 Harv. L. Rev. 393, 405 (1899).

c. A second view, espoused by Dean Christopher Columbus Langdell and Prof. James Bradley Thayer of Harvard Law School, surmised that the Constitution applied only to the States, and not to outlying territories.

Langdell hypothesized that the Constitution had "no application to territory which is subject to no

State sovereignty, and in which the United States can exercise all the power which can be exercised within a State either by the State or by the United States." C.C. Langdell, *The Status of Our New Territories*, 12 Harv. L. Rev. 365, 388 (1899). In Langdell's view, the "one known mode of incorporating newly acquired territory into the United States" and thereby entitling its citizens to the protections of the Constitution was "by admitting it as a State." *Ibid.* Thayer agreed that "when a new region is acquired it does not at once and necessarily become a part of what we call the 'territory' of the United States." James Bradley Thayer, *Our New Possessions*, 12 Harv. L. Rev. 464, 471 (1899). Rather, he maintained, the United States had the "legal, constitutional power, to govern [newly acquired lands] as colonies, substantially as England might govern them." *Id.* at 467. Only if these territories were admitted to statehood would their inhabitants become entitled to plenary constitutional rights.

d. Finally, in an article that followed the others just discussed, Prof. Abbott Lawrence Lowell of Harvard proposed what he called a "Third View."

Lowell believed that neither Randolph and Baldwin's argument nor Langdell and Thayer's was wholly acceptable. He argued that Randolph and Baldwin's position—that the Constitution applied fully in the territories—was "irrational, because it extends the restrictions of the Constitution to conditions where they cannot be applied without rendering the government of our new dependencies well-nigh impossible." Abbott Lawrence Lowell, *The Status of Our New Possessions—A Third View*, 13 Harv. L. Rev. 155, 157 (1899). On the other hand, he explained, Langdell and Thayer's view—that the Con-

stitution had *no* application in the territories—produced anomalous and troubling consequences: Congress could take property from persons in the District of Columbia or the territories without just compensation, or pass bills of attainder there. *Id.* at 156-57

Lowell articulated an intermediate position: that "possessions acquired by conquest or cession do not become a part of the United States," and could be "incorporat[ed]" into the Union only by legislative action. Lowell, *supra*, at 176. In unincorporated territories, Lowell explained, certain constitutional provisions would apply, but others, "such as those requiring uniformity of taxation and trial by jury," would not. *Ibid.*

e. Despite their differing legal conclusions, all of these scholars shared the belief that the inhabitants of the newly acquired territories were so different from and inferior to the U.S. citizens who resided in the States that applying the Constitution in these territories would be cause for concern.

Those who held that the Constitution applied only in the States were certainly of this view. Langdell suggested that the Bill of Rights was "so peculiarly and so exclusively English that an immediate and compulsory application of [it] to ancient and thickly settled Spanish colonies would furnish as striking a proof of our unfitness to govern dependencies, or to deal with alien races, as our bitterest enemies could desire." Langdell, *supra*, at 386. And Thayer opined that admitting any "extra-continental" state into the Union was an "intolerable suggestion." Thayer, *supra*, at 484.

But even those who held that the Constitution followed the flag everywhere in the world were rueful of the fact. Baldwin commented that giving "the half-civilized Moros of the Philippines, or the ignorant and lawless brigands that infest Puerto Rico" constitutional rights would be a "serious obstacle to the maintenance there of an efficient government." Baldwin, *supra*, at 415. Randolph, for his part, declared that the "Philippine islanders are, and are likely to remain, unfit for statehood," and he suggested various ways in which the United States could avoid annexing the Philippines and triggering application of the Constitution. Randolph, *supra*, at 305.

Lowell, the proponent of the "Third View," likewise believed that the inhabitants of the new territories differed from other U.S. citizens in significant ways. Indeed, he relied on that proposition in order to distinguish between the constitutional rights that he thought should apply in the territories and those that should not. He explained that "restrictions upon the power of Congress" have a "universal bearing" and thus applied everywhere, including unincorporated territories. Lowell, *supra*, at 176. By contrast, he argued, "the rights guaranteed to the citizens," such as those found in the Bill of Rights, were "inapplicable except among a people whose social and political evolution has been consonant with our own"—which, in his view, the inhabitants of the new territories were not. *Ibid.*

Thus, at the time that the *Insular Cases* were decided, there was widespread agreement that applying the full panoply of constitutional provisions in the new territories was unwise because the populations of those territories were not ready for such rights and enforcing them would tie the hands of ter-

ritorial governments. The real debate was over whether the law nonetheless *required* that the Constitution be enforced there. It was this question that was presented for review in the *Insular Cases*.

2. *The* Insular Cases *Made These Now-Discredited Beliefs The Basis For A Rule Of Constitutional Law*

a. There is disagreement among commentators as to which cases are encompassed by the term "*Insular Cases*," but at a minimum, the term refers to six cases decided by this Court on May 27, 1901.[5] These cases addressed legal issues that had arisen in the wake of the Foraker Act, which Congress enacted in 1900 to provide for a territorial government in Puerto Rico. The Act imposed duties on trade between Puerto Rico and the mainland United States in order to fund the new government. Pub. L. No. 56-191, §§ 2-4, 31 Stat. 77, 77-78 (1900).

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[5] *De Lima* v. *Bidwell*, 182 U.S. 1, 200 (1901) (holding that Puerto Rico is not a "foreign country" for purposes of tariff laws); *Goetze* v. *United States*, 182 U.S. 221, 221-22 (1901) (same, with respect to Puerto Rico and Hawaii); *Dooley* v. *United States*, 182 U.S. 222, 236 (1901) (holding that the President's Article II authority to impose tariffs on goods imported to Puerto Rico from the United States expired after the island was ceded to the United States); *Armstrong* v. *United States*, 182 U.S. 243, 244 (1901) (same); *Downes* v. *Bidwell*, 182 U.S. 244, 287 (1901) (holding that Puerto Rico is not part of the United States for purposes of the Uniformity Clause); *Huus* v. *New York & Porto Rico S.S. Co.*, 182 U.S. 392, 397 (1901) (holding that a ship traveling between New York and Puerto Rico was engaged in the "coasting trade," rather than in foreign commerce).

b. In the first of the *Insular Cases*, *De Lima* v. *Bidwell*, 182 U.S. 1 (1901), a firm that had paid tariffs on goods imported to New York from Puerto Rico *before* the enactment of the Foraker Act sued to recover the tariffs, arguing that Puerto Rico was not a foreign country and that the imports thus should not have been taxed. The Court agreed, holding that a territory could not "be at the same time both foreign and domestic" and that Puerto Rico was thus part of the United States, for purposes of the tariff laws, from the moment it was acquired in the Treaty of Paris. *Id.* at 199-200.

In dissent, Justice McKenna borrowed from Lowell's incorporation theory to argue that the tariffs had been properly collected. The majority opinion, he contended, presumed that Puerto Rico had been incorporated into the United States by the Treaty of Paris, when in fact it had not. *De Lima*, 182 U.S. at 217 (McKenna, J., dissenting). The treaty, in Justice McKenna's view, had left the question of incorporation to Congress. *Id.* at 214.

Justice McKenna warned against the dangers he perceived would follow from concluding that "our Constitution and laws, immediately apply on cession of territory." *De Lima*, 182 U.S. at 219. He explained that if that were the case, the government "could make no accommodation to exigency [and] would stand bound in a helpless fatality." *Ibid.* Construing the treaty and the Constitution not to incorporate Puerto Rico into the United States would allow the territories to be governed with a freer hand and avoid "the danger of the nationalization of savage tribes." *Ibid.*

c. *De Lima*'s conclusion that Puerto Rico was part of the United States led inexorably to the next

and most significant of the *Insular Cases*, *Downes* v. *Bidwell*, 182 U.S. 244 (1901), where the incorporation theory featured prominently again.

Downes presented the question whether the Foraker Act's duties on goods transported between Puerto Rico and the mainland violated the Uniformity Clause of the Constitution, which requires that "all Duties, Imposts and Excises shall be uniform throughout the United States." U.S. Const. art. I, § 8, cl. 1. The Court held by a five-to-four vote that the Act was constitutional because the Uniformity Clause did not apply to Puerto Rico, but the Justices in the majority produced several different opinions explaining why this was so.

Justice Brown, who announced the judgment of the Court but wrote only for himself, worried openly about the potential consequences of holding that the Constitution fully applied, of its own force, in every place subject to the control of the United States. "It is obvious," he explained, "that in the annexation of outlying and distant possessions grave questions will arise from differences of race, habits, laws, and customs of the people * * * which may require action on the part of Congress that would be quite unnecessary in the annexation of contiguous territory inhabited only by people of the same race, or by scattered bodies of native Indians." *Downes*, 182 U.S. at 282.

Justice Brown observed that because the "alien races" that inhabited the new territories that the United States had acquired differed from other Americans in "religion, customs, laws, methods of taxation, and modes of thought, the administration of government and justice, according to Anglo-Saxon principles, may for a time be impossible." *Downes*, 182 U.S. at 287. Thus, he argued, it was appropriate

that "large concessions . be made for a time, that ultimately our own theories may be carried out, and the blessings of a free government under the Constitution extended to them." *Ibid.* He concluded "that the island of Porto Rico is a territory appurtenant and belonging to the United States, but not a part of the United States within the revenue clauses of the Constitution." *Ibid.*

Justice Edward White, writing for himself and two other Justices, concurred in the judgment on the basis of Lowell's incorporation theory. He argued that "where a treaty contains no conditions for incorporation * * * that incorporation does not arise until in the wisdom of Congress it is deemed that the acquired territory has reached that state where it is proper that it should enter into and form a part of the American family." *Downes*, 182 U.S. at 339 (White, J., concurring). Because no such incorporation had occurred, he explained, "while in an international sense Porto Rico was not a foreign country, since it was subject to the sovereignty of and was owned by the United States, it was foreign to the United States in a domestic sense." *Id.* at 341.

The final member of the majority, Justice Gray, agreed "in substance" with Justice White's opinion, but he wrote separately to explain that the basis for his views was his belief that "[c]ivil government cannot take effect at once" in "territory acquired by war"; rather, he argued, "[t]here must, of necessity, be a transition period." *Downes*, 182 U.S. at 345 (Gray, J., concurring). "If Congress is not ready to construct a complete government for the conquered territory," he concluded, "it may establish a *temporary* government, which is not subject to all the re-

strictions of the Constitution." *Id.* at 346 (emphasis added).

In dissent, Justice Harlan denounced the majority's reasoning. He vehemently denied the notion that "Congress can deal with new territories just as other nations have done or may do with their new territories." *Downes*, 182 U.S. at 380 (Harlan, J., dissenting). "This nation," he explained, "is under the control of a written constitution * * * Monarchical and despotic governments, unrestrained by written constitutions, may do with newly acquired territories what this government may not do consistently with our fundamental law. To say otherwise is to concede that Congress may, by action taken outside of the Constitution, engraft upon our republican institutions a colonial system such as exists under monarchical governments. Surely such a result was never contemplated by the fathers of the Constitution. If that instrument had contained a word suggesting the possibility of a result of that character it would never have been adopted by the people of the United States." *Ibid.*

d. Although the incorporation theory failed to command a majority of the Court in *Downes*, it soon became enshrined as a feature of U.S. constitutional law. Just three years later, the Court decided *Dorr* v. *United States*, 195 U.S. 138 (1904), where five Justices agreed for the first time that there was a constitutional distinction between incorporated and unincorporated territories.

In *Dorr*, two petitioners convicted of criminal libel in the Philippines without a jury challenged their convictions under the Sixth Amendment. Relying heavily on *Downes*, the majority concluded that Congress was not required to "enact for ceded territory

not made a part of the United States by Congressional action, a system of laws which shall include the right of trial by jury, and that the Constitution does not, without legislation, and of its own force, carry such right to territory so situated." *Dorr*, 195 U.S. at 149. The Court accordingly sustained the petitioners' convictions.

e. In 1917, the legal status of the inhabitants of Puerto Rico underwent a dramatic change with the passage of the Jones-Shafroth Act. The Jones-Shafroth Act declared all Puerto Ricans to be U.S. citizens, and it set out a "Bill of Rights" granting certain legal rights—though not all the rights contained in the Constitution's Bill of Rights—to Puerto Ricans. Pub. L. No. 63-368, ch. 145, §§ 2, 5, 39 Stat. 951, 951-53 (1917).

Five years later, in *Balzac* v. *Porto Rico*, 258 U.S. 298 (1922), the Court was confronted with the question whether the grant of U.S. citizenship to Puerto Ricans had changed the unincorporated status of the territory. *Balzac*, like *Dorr*, involved a petitioner convicted of criminal libel without a jury, this time in Puerto Rico. The petitioner in *Balzac* argued that his conviction violated the Sixth Amendment.

The Court now held unanimously that Puerto Rico had not been incorporated and that the Sixth Amendment thus did not apply there. Writing for the Court, Chief Justice Taft rejected the petitioner's argument that the Jones-Shafroth Act, by conferring U.S. citizenship on Puerto Ricans, had made Puerto Rico an incorporated territory. The Chief Justice acknowledged that an act of Congress "declaring an intention to confer political and civil rights on the inhabitants of * * * new lands as American citizens" could cause a territory to be incorporated. *Balzac*,

258 U.S. at 309. Indeed, the Court had relied on such an act when it held in *Rassmussen* v. *United States*, 197 U.S. 516 (1905), that Alaska was an incorporated territory. See *id.* at 522 (holding that treaty language providing that "inhabitants of [Alaska] * * * shall be admitted to the enjoyment of all the rights, advantages, and immunities of citizens of the United States" incorporated Alaska into the United States) (internal quotation marks omitted).

The Chief Justice explained, however, that Puerto Rico presented a much different case from Alaska: "Congress has thought that a people like the Filipinos, or the Porto Ricans, trained to a complete judicial system which knows no juries, living in compact and ancient communities, with definitely formed customs and political conceptions, should be permitted themselves to determine how far they wish to adopt this institution of Anglo-Saxon origin, and when." *Balzac*, 258 U.S. at 310. Accordingly, the Court should not "lightly" infer "an intention to incorporate in the Union these distant ocean communities of a different origin and language from those of our continental people." *Id.* at 311.

The Court thus held that the Jones-Shafroth Act had not incorporated Puerto Rico into the United States. Although *Balzac* acknowledged that "[t]he guaranties of certain fundamental personal rights declared in the Constitution, as, for instance, that no person could be deprived of life, liberty, or property without due process of law, had from the beginning full application in the Philippines and Porto Rico," other rights would not apply in Puerto Rico unless and until it became incorporated. *Balzac*, 258 U.S. at 312-13. This holding completed the "constitutional[] rationaliz[ation]" of the colonial status of the territo-

ries that began in *Downes*. See Carlos Ivan Gorrin Peralta, *Puerto Rico and the United States at the Crossroads*, in Reconsidering the Insular Cases: The Past and Future of the American Empire 183, 183 (Gerald L. Neuman & Tomiko Brown-Nagin eds., 2015).

B. As A Result Of The *Insular Cases*, Puerto Ricans And Other Territorial Residents Still Lack Full Constitutional Rights.

1. Under *Balzac*, this Court has held that a number of specific constitutional rights are sufficiently "fundamental" to apply in unincorporated territories such as Puerto Rico.[6] But the Court has never reexamined the validity of the *Insular Cases*' incorporation doctrine, although a number of Justices have criticized the decisions. See *Torres* v. *Puerto Rico*, 442 U.S. 465, 475-76 (Brennan, J., concurring) ("Whatever the validity of the [*Insular Cases*] * * * in the particular historical context in which they were decided, those cases are clearly not authority for questioning the application of the Fourth Amendment—or any other provision of the Bill of Rights—to the Commonwealth of Puerto Rico in the 1970's."); *Reid* v. *Covert*, 354 U.S. 1, 14 (1957) (plurality opinion) ("[N]either the [*Insular Cases*] nor their reasoning should be given any further expansion."). As a

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[6] See *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 668 n.5 (1974) (Due Process Clause of either the Fifth or Fourteenth Amendment); *Examining Bd. of Eng'rs, Architects & Surveyors* v. *Flores de Otero*, 426 U.S. 572, 601 (1976) (equal protection right under either the Fifth or Fourteenth Amendment); *Torres* v. *Puerto Rico*, 442 U.S. 465, 471 (1979) (Fourth Amendment, either "directly or by operation of the Fourteenth Amendment").

result, Puerto Ricans and other territorial residents do not enjoy all of the civil rights granted to other U.S. citizens.

2. Perhaps the most glaring disparity imposed by the *Insular Cases* is that Puerto Ricans, unlike other U.S. citizens, have only limited rights to a jury trial in criminal cases.

Because the Sixth Amendment does not apply in Puerto Rico, defendants in local Puerto Rican courts enjoy only those rights provided by the Constitution of Puerto Rico. Under the Puerto Rican constitution, jury trials are required only for felony cases. P.R. Const. art. II, § 11. By contrast, the Sixth Amendment guarantees to defendants a right to jury trial in *all* state and federal criminal cases where the potential punishment exceeds six months. See *Lewis* v. *United States*, 518 U.S. 322, 326 (1996). Thus, under the *Insular Cases*, many Puerto Ricans are tried without juries in situations where citizens of the States would enjoy that vital constitutional protection.

3. Another troubling consequence of the *Insular Cases* is that they have contributed to the development of a weakened form of equal protection doctrine that allows Congress to enact laws that overtly disfavor Puerto Rico, evidencing Puerto Rico's colonial status.

The first decision in this vein was *Califano* v. *Torres*, 435 U.S. 1 (1978) (per curiam), where the Court considered a constitutional challenge to Social Security's Supplemental Security Income (SSI) program. The SSI program, which provides aid to elderly, blind, and disabled persons, makes benefits available only in the "50 States and the District of Co-

lumbia." 42 U.S.C. § 1382c(e). Several petitioners, who received SSI benefits while residing in various States and then lost them upon moving to Puerto Rico, alleged that this denial of benefits was unconstitutional. A three-judge district court agreed with the petitioners.

On appeal, this Court summarily reversed. The basis for the lower court's decision had been the constitutional right to travel, which the Court held did not require a State to "continue to pay * * * benefits indefinitely to any persons who had once resided there." *Torres*, 435 U.S. at 4. But the Court also addressed and rejected the claim in the petitioner's complaint that excluding Puerto Rico from the SSI program violated equal protection. The Court agreed with the lower court that "Congress has the power to treat Puerto Rico differently, and that every federal program does not have to be extended to it." *Id.* at 3 n.4. As support for that proposition, the Court cited *Balzac*, *Dorr*, and *Downes*.

Similarly, in *Harris* v. *Rosario*, 446 U.S. 651 (1980) (per curiam), the Court rejected an equal protection challenge to the Aid to Families with Dependent Children (AFDC) program, under which "Puerto Rico receives less assistance than do the States." *Id.* at 651. The Court held that Congress "may treat Puerto Rico differently from States so long as there is a rational basis for its actions." *Id.* at 651-52 (citing *Torres*, 435 U.S. at 1). The Court found there to be three such rational bases: "Puerto Rican residents do not contribute to the federal treasury; the cost of treating Puerto Rico as a State under the statute would be high; and greater benefits could disrupt the Puerto Rican economy." *Id.* at 652.

Torres and *Harris* were both decided *after* Congress enacted Public Law 600, which allowed Puerto Rico to adopt its own constitution and organize its own local government. The decisions confirm that although Public Law 600 elevated Puerto Rico's status in an "abstract juridical sense," to that of a "commonwealth," the "unavoidable reality" is that federal authority over Puerto Rico remains "utterly unbridled." See Rafael Cox Alomar, *The Ideological Decolonization of Puerto Rico's Autonomist Movement*, in Reconsidering the Insular Cases: The Past and Future of the American Empire 129, 152-55 (Gerald L. Neuman & Tomiko Brown-Nagin eds., 2015).

From an economic perspective, therefore, Puerto Ricans are not the equals of other U.S. citizens. Congress can, and does, treat them differently from residents of the States.

C. This Court Should Reject Any Further Reliance On The *Insular Cases*.

1. *In An Appropriate Case, The* Insular Cases *Should Be Overruled*

a. The outdated reasoning of the *Insular Cases* has long since been discarded by the American people. No one today would contend that Puerto Ricans or other territorial residents are an "alien race[]" unprepared for the "blessings of a free government," *Downes*, 182 U.S. at 287, or "savage tribes" unworthy of inclusion in American society. *De Lima*, 182 U.S. at 219 (McKenna, J., dissenting). Nor is it plausible any longer to suggest that the United States has the power to "govern [the territories] as colonies." Thayer, *supra*, at 467 Such imperialist notions are now recognized as incompatible with the high ideals

of freedom, equality, and self-determination for which the United States should stand.

To the extent that the *Insular Cases* rested on the theory that it would be best to withhold constitutional guarantees from territorial residents "for a time" to allow for political transition, *Downes*, 182 U.S. at 287, that justification for the cases has likewise been eroded. One hundred and seventeen years have elapsed since the end of the Spanish-American War, and today, Puerto Rico, like all of the other territories of the United States, has a well ordered and democratic local government. The "temporary" suspension of rights that the *Insular Cases* authorized is simply no longer warranted. *Id.* at 346 (Gray, J., concurring). On the contrary, leaving the *Insular Cases* in place suggests that it is acceptable to maintain Puerto Rico in a permanent state of colonialism and hinders the decolonialization process that the Colegio has promoted through self-determination by a constitutional assembly convention.

To be sure, cultural differences between the territories and the rest of the United States remain. But those differences are not nearly great enough to justify denying important constitutional rights to territorial residents. For example, although the Court in *Balzac* doubted whether Puerto Ricans were prepared for the "responsibilities" of a system of jury trials, today, Puerto Ricans serve on juries in felony cases in local courts without difficulty.[7] The Revised

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[7] Puerto Ricans have also served on juries in the U.S. District Court for the District of Puerto Rico since shortly after its creation in 1900—long before *Balzac* was decided. See Pub. L. No. 294, ch. 3542, 34 Stat. 466 (1906) (defining qualifications of jurors in the U.S. District Court for the District of Puerto Rico).

Organic Act of the Virgin Islands also provides for jury trials in some criminal cases, see 48 U.S.C. § 1616, as do the Organic Act of Guam, *id.* § 1421b(u), and the Commonwealth Code of the Northern Mariana Islands. 7 N. Mar. I. Code § 3101. It no longer makes sense to distinguish between the States and the territories for purposes of the Sixth Amendment and other important rights.

In short, the distinction between incorporated and unincorporated territories has long since lost whatever justification underlay it. This Court should consider abrogating the *Insular Cases* when presented with the appropriate opportunity to do so.

b. Although the *Insular Cases* are long-standing precedents, *stare decisis* does not counsel against this Court's overruling them.

As this Court has observed, "*[s]tare decisis* is not an inexorable command; rather, 'it is a principle of policy and not a mechanical formula of adherence to the latest decision.'" *Payne* v. *Tennessee*, 501 U.S. 808, 828 (1991). In particular, the Court will not apply *stare decisis* "when governing decisions are unworkable or are badly reasoned." *Id.* at 827. The reasoning of the *Insular Cases* no longer stands up to scrutiny, and this Court is not obliged to follow it.

Moreover, *stare decisis* is at its weakest in constitutional cases, where "correction through legislative action is practically impossible." *Id.* at 828 (quoting *Burnet* v. *Coronado Oil & Gas Co.*, 285 U.S. 393, 407 (1932) (Brandeis, J., dissenting)). The *Insular Cases* present just that difficulty: although Congress has the power to change the status of Puerto Rico or other territories if it chooses, it has no power to alter the constitutional doctrine of incorporated and unincor-

porated territories. Only this Court can abolish that arbitrary distinction, and in an appropriate case, it should do so.

2. *The Court Should Not Rely On The* Insular Cases *In Deciding This Case*

This case does not squarely present the question whether the *Insular Cases* remain good law, but the Court's treatment of them here will affect their precedential value. The Court thus should avoid relying in any way on the *Insular Cases* in resolving this matter. Doing so would wrongly send a message to Congress, the Executive, and lower courts that the flawed reasoning of those cases remains valid.

The Court need not refer to the *Insular Cases* here, because as respondents point out in their brief, the question whether Puerto Rico is a separate "sovereign" for purposes of the Double Jeopardy Clause does not depend on whether the Commonwealth of Puerto Rico is an "incorporated" or "unincorporated" territory. Resp'ts' Br. 20.

Rather, as the Supreme Court of Puerto Rico rightly concluded, the mere fact that Puerto Rico is a territory is dispositive of the question presented. As the Court has long recognized, "a territorial government is entirely the creation of Congress, 'and its judicial tribunals exert all their powers by authority of the United States.'" *United States* v. *Wheeler*, 435 U.S. 313, 321 (1978) (quoting *Grafton* v. *United States*, 206 U.S. 333, 354 (1907)). Thus, "[w]hen a territorial government enacts and enforces criminal laws to govern its inhabitants, it is not acting as an independent political community like a State, but as an agency of the federal government." *Ibid.* (internal quotation marks omitted). In other words, "Territory

and Nation[] are not two separate sovereigns to whom the citizen owes separate allegiance in any meaningful sense, but one alone." *Ibid.*

Recognizing the federal origin of Puerto Rico's authority does not demean the residents of Puerto Rico. The Constitution of Puerto Rico accords real personal rights to Puerto Ricans, and Puerto Ricans have long exercised substantial autonomy in organizing their internal affairs. But, that autonomy notwithstanding, there remains no such thing as a "sovereign territory." Puerto Rico's territorial status therefore settles the question whether it is a separate sovereign under the Double Jeopardy Clause conclusively. See *United States* v. *Lara*, 541 U.S. 193, 226 (2004) (Thomas, J., concurring) ("[T]he Court has held that the Territories are the United States for double jeopardy purposes * * * It is for this reason * * * that the degree of autonomy of Puerto Rico is beside the point.").

CONCLUSION

The judgment of the Supreme Court of Puerto Rico should be affirmed.

Respectfully submitted.

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Respondents.

On Writ of Certiorari to the Supreme Court of Puerto Rico

BRIEF OF CURRENT AND FORMER SENIOR PUERTO RICO OFFICIALS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF OF CURRENT AND FORMER SENIOR PUERTO RICO OFFICIALS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are individuals who are currently serving or have served at the highest levels of Puerto

[1] This brief is filed with the written consent of all parties through universal letters of consent on file with the Clerk. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici curiae*, their counsel, or the Committee on Puerto Rico and the U.S. Constitution made a monetary contribution intended to fund its preparation or submission.

Rico's government, including two former Governors, three current or former Resident Commissioners, three former Senate Presidents, three former House Speakers, four former Attorneys General, and a former Puerto Rico appellate court judge. By virtue of their positions, *amici* have dealt firsthand with issues implicating the constitutional and political relationship between Puerto Rico and the federal government. *Amici* thus possess special insight into the ramifications of any decision implicating that relationship and have a substantial interest in the proper resolution of the question presented in this case.

Luis G. Fortuño served as the ninth elected Governor of Puerto Rico from 2009-2012. Prior to holding that Office, Governor Fortuño was Resident Commissioner of Puerto Rico from 2005-2008.

Carlos A. Romero-Barceló served as the fifth elected Governor of Puerto Rico from 1977-1985. Prior to holding that Office, he served as Mayor of the city of San Juan from 1969-1977, and after serving as Governor, he was Resident Commissioner of Puerto Rico from 1993-2000.

Pedro R. Pierluisi is the Resident Commissioner of Puerto Rico (2009-present), and served as Attorney General of Puerto Rico from 1993-1996.

Kenneth Davison McClintock-Hernández served as Secretary of State of Puerto Rico from 2009-2013. In addition, Secretary McClintock was elected to four consecutive terms in the Puerto Rico Senate beginning in 1992, serving as Minority Leader from 2001-2004 and as President from 2005-2008.

Thomas Rivera Schatz is a Puerto Rico Senator who also served as President of the Puerto Rico Senate (2009-2012).

Charles A. Rodríguez served as President of the Puerto Rico Senate (1997-2000).

Rolando A. Silva served in the Puerto Rico Senate from 1981-1997

Rep. Jenniffer González is the Minority Leader of the Puerto Rico House of Representatives (2013-present) and a former Speaker (2009-2012).

Rep. José F. Aponte-Hernández is a former Speaker of the Puerto Rico House of Representatives (2005-2008), as well as a current Member (2000-present).

Zaida Hernández-Torres, Esq., is a former Puerto Rico Appellate Court Judge (1998-2008) and a former Speaker of the Puerto Rico House of Representatives (1993-1996).

Angel M. Cintrón-García, Esq., served in the Puerto Rico House of Representatives from 1989-2002, including as Majority Leader.

Carlos J. Méndez is the Minority Whip of the Puerto Rico House of Representatives (2013-present) and served as Majority Leader from 2011-2012.

Guillermo A. Somoza-Colombani served as Attorney General of Puerto Rico from 2009-2012.

Antonio M. Sagardía-De Jesús served as Attorney General of Puerto Rico during 2009.

José A. Fuentes Agostini served as Attorney General of Puerto Rico from 1997-1999.

Ana C. Alemañy served as Secretary of the Puerto Rico Housing Department from 1997-1999.

Dr. Norman Maldonado served as President of the University of Puerto Rico from 1993-2001.

Dr. José M. Saldaña served as President of the University of Puerto Rico from 1988-1993.

Joaquín A. Márquez, Esq., served as Director of the Puerto Rico Federal Affairs Administration—the executive agency of the Puerto Rico government that represents the territory before entities of or in the United States—from 1981-1985.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici firmly believe that the territory of Puerto Rico is not a separate "sovereign" from the United States for purposes of the Double Jeopardy Clause—or for any other constitutional purpose. *Amici* therefore agree with Respondents that the decision of the Supreme Court of Puerto Rico should be affirmed.

In the face of Petitioner's suggestions that "[t]his is the most important case on the constitutional relationship between Puerto Rico and the United States," Pet. 1, and that "Puerto Rico is in the same position as most of the States," Pet. Br. 44, *amici* write separately to reinforce established constitutional principles that should not—and need not—be disturbed by this case. Puerto Rico has been, and remains, a territory subject to Congress's plenary authority under the Territorial Clause. This Court's recognition that the current territorial government is "State-like" in some respects is the product of congressional action, not constitutional evolution. As

such, any appearance of "sovereignty" exercised by the territory of Puerto Rico is conferred statutorily and subject to revision by a future Congress.

In any event, however this Court ultimately resolves the narrow question presented, it can and should decline Petitioner's invitation to embroil itself in matters not before it. As Petitioner ultimately acknowledges, whether the territory of Puerto Rico can be treated as a "sovereign" separate from the federal government for double jeopardy purposes does not bear on the broader question of the territory's political status or relationship to the United States in other respects. Moreover, a ruling that even arguably suggests a federal constitutional notion of State-like sovereignty beyond the strictures of the Double Jeopardy Clause could have far-reaching and unintended consequences for the long-running political debate over Puerto Rico's status, as well as for other settled legal questions.

ARGUMENT

I. FUNDAMENTAL LEGAL PRINCIPLES CONTRAVENE THE NOTION OF PUERTO RICO "SOVEREIGNTY"

This case presents the narrow question of whether "Puerto Rico and the Federal Government are separate sovereigns *for purposes of the Double Jeopardy Clause of the United States Constitution*." Pet. Br. i (emphasis added). Despite Petitioner's appropriately tailored (albeit erroneous) answer to that question, *see, e.g.*, *id.* at 28-32, and its insistence that "[t]he extent of Congress' authority over Puerto Rico under the Territorial Clause has no bearing *** here," *id.* at 39-40, Petitioner encourages this Court

to place the territory of Puerto Rico on equal footing with the States and to circumscribe the power that the Constitution vests in Congress to regulate Puerto Rico under the Territorial Clause, *see, e.g.*, *id.* at 41-44.[2]

Doing so would be both incorrect as a legal matter and ill-advised as a practical matter. In the end, Petitioner does not dispute the basic principles of Puerto Rico's constitutional status as a territory subject to Congress's plenary power, or disputes them indirectly but claims the dispute is immaterial. Either way, Petitioner provides no basis to disturb those established constitutional principles in this case.

A. Puerto Rico Is A Territory Subject To Congressional Control

1. As a matter of constitutional law, Puerto Rico has been—and remains—a territory of the United States. The Constitution recognizes only "States" and "Territor[ies]," and obviously Puerto Rico is not a "State[] *** admitted by the Congress into this union." U.S. CONST. art. IV, § 3.

This Court has declined to endorse the notion that, as a matter of constitutional law, the territory of Puerto Rico has attained "State" status. *See Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S.

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[2] Puerto Rico's exclusion from the federal democratic process renders complete equal footing with the States impossible. As *amici* explain below (*see* pp. 20-21, *infra*), discussions of Puerto Rico's "State-like" treatment at times glosses over the material point that, regardless of any "State-like" powers Congress may grant on a piecemeal basis, the territory's access to fundamental democratic rights is out of reach unless it becomes a State.

663, 672 (1974) ("Puerto Rico has thus not become a State in the federal Union like the 48 States[.]") (quoting *Mora v. Mejias*, 206 F.2d 377, 387 (1st Cir. 1953)); *see also District of Columbia v. Carter*, 409 U.S. 418, 424 n.11 (1973) ("[T]he Territories are not 'States' within the meaning of the Fourteenth Amendment.") (citing *South Porto Rico Sugar Co. v. Buscaglia*, 154 F.2d 96, 101 (1st Cir. 1946)). Likewise, in confronting a claim that the Extradition Clause should apply directly to the territory, the Court noted that "the words of the Clause apply only to 'States'" and reiterated that it has "never held that the Commonwealth of Puerto Rico is entitled to all the benefits conferred upon the States under the Constitution." *Puerto Rico v. Branstad*, 483 U.S. 219, 229 (1987).

The territory's constitutional status is further grounded in a longstanding line of cases—albeit with a deeply checkered historical, political, and legal legacy—dating back to its cession. In *Downes v. Bidwell*, 182 U.S. 244 (1901), this Court made clear that Puerto Rico was an "unincorporated" territory to which all provisions of the Constitution did not automatically extend. As Justice White's authoritative opinion concluded, Puerto Rico "had not been incorporated into the United States, but was merely appurtenant thereto as a possession" that "was subject to the sovereignty of and was *owned* by the United States." *Id.* at 341-342 (White, J., concurring) (emphasis added); *Balzac v. Porto Rico*, 258 U.S. 298, 305 (1922) ("[T]he opinion of Mr. Justice White of the majority, in *Downes v. Bidwell*, has become the settled law of the court."). In *Balzac*, the Court for the first time deemed a territory

"unincorporated" after Congress had conferred citizenship on its inhabitants. *See* 258 U.S. at 307 & n.1. *Balzac* thereby originated a legal distinction between the political status and rights of U.S. citizens in Puerto Rico, and that of U.S. citizens in "incorporated" territories (*e.g.*, Louisiana or Alaska). That "century-old" distinction survives to this day. *Boumediene v. Bush*, 553 U.S. 723, 757-759 (2008).

Amici fully recognize the imperialist context in which the *Insular Cases* were decided and the fundamentally anachronistic and flawed doctrine of territorial incorporation that those cases produced.[3] Nonetheless, as the issue of incorporation has become decidedly a political one for Congress and the U.S. citizens of Puerto Rico to address, *see* pp. 19-21, *infra*, this Court need not delve further into this fraught body of law.

2. As a territory, Puerto Rico is subject to Congress's "Power to dispose of and make all needful Rules and Regulations respecting the Territory *** belonging to the United States." U.S. CONST. art. IV, § 3, cl. 2. That grant of authority in the so-called "Territorial Clause" has long been understood to be plenary. *See Kansas v. Colorado*, 206 U.S. 46, 92 (1907) ("These arid lands are largely within the territories, and over them, by virtue of the [Territorial Clause] *** or by virtue of the power vested in the national government to acquire

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[3] *E.g.*, JUAN R. TORRUELLA, THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL 3 (1988) (arguing that *Insular Cases* "stand at a par with *Plessy v. Ferguson* in permitting disparate treatment by the government of a discrete group of [U.S.] citizens").

territory by treaties, Congress has full power of legislation, subject to no restrictions other than those expressly named in the Constitution[.]"); *National Bank v. County of Yankton*, 101 U.S. 129, 133 (1879) ("All territory within the jurisdiction of the United States not included in any State must necessarily be governed by or under the authority of Congress.").

Indeed, in discussing Puerto Rico specifically, the Court has acknowledged that "[t]he plenitude of the power of Congress *** has been manifest from the earliest days," and that "there is no express or implied limitation on Congress in exercising its power to create local governments for any and all of the territories," apart from the Constitution itself. *Downes*, 182 U.S. at 290-291 (White, J., concurring); *see id.* at 298-299 ("There can also be no controversy as to the right of Congress to locally govern the island of Porto Rico as its wisdom may decide[.]"); *see also Torres v. Puerto Rico*, 442 U.S. 465, 469 (1979) ("[T]he limitation on the application of the Constitution in unincorporated territories is based in part on the need to preserve Congress' ability to govern such possessions."). That constitutional authority "undoubtedly" includes "the right *** to change such local governments at [its] discretion." *Downes*, 182 U.S. at 290-291 (White, J., concurring).

Petitioner is therefore wrong to suggest—as it recognizes, unnecessarily—that Public Law 600 effected a permanent or partial relinquishment of the constitutional authority of each Congress to alter the powers exercised by the government of Puerto Rico.[4]

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[4] Public Law 600, Act of July 3, 1950, Pub. L. No. 81-600, 64 Stat. 319, "offered the people of Puerto Rico a compact whereby

See Pet. Br. 41-43. Territorial governments have an "ephemeral nature" and, under the Territorial Clause, Congress may confer "different forms of government" on a territory, *Downes*, 182 U.S. at 290-291, 293 (White, J., concurring) (discussing District of Columbia as "instance which exemplifies the exercise of the power [to create local governments for territories] substantially in all its forms"). That is precisely what Congress did with respect to the territory of Puerto Rico when it made several "significant changes [to] Puerto Rico's governmental structure" through amendments to Puerto Rico's various organic acts. *Calero-Toledo*, 416 U.S. at 671-672 (providing historical overview).

Even assuming Public Law 600 "work[ed] a significant change in the relation between Puerto Rico and the rest of the United States," *Cordova & Simonpietri Ins. Agency Inc. v. Chase Manhattan Bank NA*, 649 F.2d 36, 39 (1st Cir. 1981), that change could not have altered their constitutional relationship. At the very least, it cannot be the case that "[i]n 1952, Puerto Rico ceased being a territory of the United States subject to the plenary powers of Congress as provided in the Federal Constitution," or that "[t]he authority exercised by the federal

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they might establish a government under their own constitution." *Calero-Toledo*, 416 U.S. at 671. After Puerto Rico accepted the compact, Congress amended and approved the local constitution. *See* 48 U.S.C. § 731d note. The effect of those events was "the repeal of numerous provisions of the Organic Act of 1917," with the "remainder becom[ing] known as the Puerto Rican Federal Relations Act." *Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 594 (1976).

government emanated thereafter from the compact itself." Pet. Br. 42 (quoting *United States v. Quiñones*, 758 F.2d 40, 42 (1st Cir. 1985)). Such a position suffers from a myriad of flaws. It runs headlong into this Court's post-Public-Law-600 recognition that Congress continues to be "empowered *under the Territory Clause*" to enact legislation pertaining to Puerto Rico. *Harris v. Rosario*, 446 U.S. 651, 651 (1980) (per curiam) (emphasis added). It would put Puerto Rico in a constitutional "no-man's land" of being neither a territory nor a State. And it would mean that Congress's ongoing authority is "defined, and limited," by the compact with Puerto Rico, rather than by "the constitution." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803).[5]

To be sure, by enacting Public Law 600, Congress in limited respects "relinquished its control

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[5] Petitioner's reliance (Br. 10, 37-38) on a Cold-War-era United Nations resolution proclaiming that the territory of Puerto Rico "achieved a new constitutional status," G.A. Res. 748 (VIII), at 26 (Nov. 27, 1953), is unavailing. Read in context, that statement "is best understood as an expression that the new relationship gave the people [of Puerto Rico] the ability to exercise self-determination and achieve independence at any time, or any other relationship to the U.S. to which agreement might be reached." H.R. REP. NO. 105-131, pt. 1, at 18 (1997). In any event, it is of little import because this Court—not the United Nations—is the final arbiter of the constitutional relationship between the United States and its territories. *See Torres*, 442 U.S. at 470 ("Congress generally has left to this Court the question of what constitutional guarantees apply to Puerto Rico."); *cf. Igartua de la Rosa v. United States* (*Igartua I*), 32 F.3d 8, 10 n.1 (1st Cir. 1994) (per curiam) ("Nor could the [International Covenant on Civil and Political Rights] override the constitutional limits discussed above.").

over the organization of the local affairs of the island." *Examining Bd. of Eng'rs*, 426 U.S. at 597. But for the reasons just explained, Congress in no way irrevocably surrendered its constitutional power to regulate Puerto Rico as a territory—including with respect to the form of its government. To hold otherwise would contravene the settled principle "that one legislature is competent to repeal any act which a former legislature was competent to pass; and that one legislature cannot abridge the powers of a succeeding legislature." *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 135 (1810); *see also Reichelderfer v. Quinn*, 287 U.S. 315, 318 (1932) ("By dedicating the lands thus acquired to a particular public use, Congress declared a public policy, but did not purport to deprive itself of the power to change that policy by devoting the lands to other uses.").

Notably, the U.S. Department of Justice has concluded "that there could not be an enforceable vested right in political status" because a "mutual consent" provision attempting to create such a right "would not bind a subsequent Congress." Office of Legal Counsel, Mutual Consent Provisions in the Guam Commonwealth Legislation: Memorandum Opinion for the Special Representative for Guam Commonwealth 1 n.2 (July 28, 1994) ("OLC Memo"). At bottom,

> Congress *** has no authority to enact legislation under the Territory Clause that would limit the unfettered exercise of its power to amend or repeal. *** The plenary power of Congress over a non-state area persists as long as the area remains in that condition and terminates only when the

> area becomes a State or ceases to be under United States sovereignty. There is no intermediary status as far as the Congressional power is concerned.

Id. at 4-5.[6]

Petitioner's (needless) bid to have this Court circumscribe the application of the Territorial Clause to Puerto Rico thus finds no support in law or history.

B. Any Sovereign-Like Powers Exercised By Puerto Rico Are Statutorily Authorized By Congress

The fact that, as a matter of constitutional law, Puerto Rico is a territory subject to Congress's plenary power is in no way at odds with this Court's observation that Puerto Rico "would seem to have become a State within a common and accepted meaning of the word." *Calero-Toledo*, 416 U.S. at 672 (citation and quotation marks omitted); *see, e.g.*, *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 8 (1982) ("Puerto Rico, like a state, is an autonomous political entity, sovereign over matters not ruled by the Constitution.") (citation and internal quotation marks omitted). Under the Territorial Clause, Congress is free as a matter of statutory law to grant

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[6] Although Petitioner is correct (Br. 42 n.5) that "[t]he general rule that one Congress cannot bind a later one *** is not absolute," the available exceptions to the rule are inapposite here. As the Office of Legal Counsel memorandum explains at length, the limitations imposed by the Fifth Amendment's Due Process Clause do not "preclude[] a subsequent Congress from repealing legislation for the governance of non-state areas enacted by an earlier Congress under the Territory Clause." OLC Memo, *supra*, at 6-10.

Puerto Rico State-like authority with respect to particular matters. But that grant cannot and does not make Puerto Rico an entity with the constitutional sovereignty of a State; to the contrary, it reinforces the fact that any "sovereignty" is legislatively conferred by Congress.

The sovereignty exercised by the States is profoundly different than any indicia of "sovereignty" exercised by the territory of Puerto Rico. "As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the *States* and the Federal Government," wherein "'[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the *States* respectively, or to the people.'" *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) (emphasis added) (quoting U.S. CONST. amend. X). By contrast, from the time Puerto Rico became a territory of the United States, the extent of its autonomy has been determined solely by Congress. "A brief interlude of military control was followed by congressional enactment of a series of Organic Acts for the government of the island," which ultimately resulted in Congress "offer[ing] the people of Puerto Rico a compact" in response to "pressures for greater autonomy." *Calero-Toledo*, 416 U.S. at 671; *see also Examining Bd. of Eng'rs*, 426 U.S. at 592-593 ("Congress responded to demands for greater autonomy *** [and] authorized [the people of Puerto Rico] to draft their own constitution[.]"). Petitioner is thus wrong to suggest that the territory "retained sovereignty" when it was ceded by Spain to the United States, that the territory's criminal laws are "'like those of a state,'" or that the Founders' decision

to "'split the atom of sovereignty'" has anything to do with the territory. Pet. Br. 25, 27, 28 (citations omitted).

Public Law 600 and the Federal Relations Act reflect that essential distinction between the territory of Puerto Rico and the States. "[T]he purpose of Congress in the 1950 and 1952 legislation was to accord to Puerto Rico the degree of autonomy and independence normally *associated with* States of the Union," *Examining Bd. of Eng'rs*, 426 U.S. at 594 (emphasis added), not to recognize that the territory possessed the same residual sovereignty that the States enjoy. *See id.* at 593 (noting that 1950s provisions were adopted "in the '*nature* of a compact'") (emphasis added) (quoting 48 U.S.C. § 731b). As Congress explained when it enacted those laws, the exercise of self-government over local affairs would occur "'[w]ithin th[e] framework'" of the U.S. Constitution and the Federal Relations Act, *id.* at 593 n.25 (quoting S. REP. NO. 82-1720, at 6 (1952)), and thus would "not change Puerto Rico's fundamental political, social, and economic relationship to the United States," H.R. REP. NO. 81-2275, at 3 (1950).

For those reasons, it is only in a limited sense that the territory of Puerto Rico exercises "a measure of autonomy comparable to that possessed by the States." *Examining Bd. of Eng'rs*, 426 U.S. at 597 Each time this Court has determined that Puerto Rico should be treated as a State, it has done so in the context of interpreting the scope of a federal statute. *See id.* at 597 ("Whether Puerto Rico is now considered a Territory or a State, *for purposes of the specific question before us*, makes little difference

because each is included within § 1983 and, therefore, 28 U.S.C. § 1343(3)."); *Calero-Toledo*, 416 U.S. at 675 (upholding "judicial practice of treating enactments of the Commonwealth of Puerto Rico as 'State statute[s]' *for purposes of the Three-Judge Court Act*") (emphasis added); *accord Cordova & Simonpietri Ins. Agency Inc.*, 649 F.2d at 38 (considering "[w]hether Puerto Rico is now to be treated as a state or a territory *for purposes of the Sherman Act*") (emphasis added).[7]

Accordingly, contrary to Petitioner's insistence (Br. 35), the "[p]ost-1952 decisions of this Court involving Puerto Rico" by no means suggest—let alone "confirm"—that "the Commonwealth's laws emanate from sovereign authority delegated by the people of Puerto Rico." Quite the opposite: any such authority derives ultimately from Congress.

II. AT MOST, THE COURT SHOULD EXPRESSLY CONFINE ANY DISCUSSION OF PUERTO RICO'S "SOVEREIGNTY" TO THE DOUBLE JEOPARDY CLAUSE

Because the territory of Puerto Rico *by statute* exercises authority that is *like* a State in some respects, even Petitioner agrees—stray suggestions aside—that the Court need not disturb more than a

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[7] *Puerto Rico v. Franklin California Tax-Free Trust*, No. 15-233, in which this Court has granted certiorari, raises a similar question of statutory interpretation: the extent to which a provision of Chapter 9 of the federal Bankruptcy Code, which refers only to a "State" and "State law," 11 U.S.C. § 903, applies to Puerto Rico in light of Congress's decision to define "State" to "include[] *** Puerto Rico, except for the purpose of defining who may be a debtor under chapter 9 of this title," *id.* § 101(52).

century of precedent regarding Congress's constitutional authority over Puerto Rico to decide this case. *See* Pet. Br. 43. To the extent the Court is inclined to resolve this case in Petitioner's favor, it should make clear that any notion of Puerto Rico's "sovereignty" is limited to the double jeopardy context. Cabining the scope of the Court's opinion in that respect is essential in light of the doctrinally distinct nature of the dual sovereignty inquiry and the political and legal ramifications of any broader statements.

A. The "Dual Sovereignty" Issue Is Distinct From The Issue Of "Sovereignty" Writ Large

Although the doctrine at issue in this case has been cast in terms of "dual sovereignty," that doctrine implicates "sovereignty"—if at all—only in a narrow sense unique to the Double Jeopardy Clause. As this Court has explained, the dual sovereignty doctrine does not concern "the extent of control exercised by one prosecuting authority over the other but rather the ultimate source of the power under which the respective prosecutions were undertaken." *United States v. Wheeler*, 435 U.S. 313, 320 (1978). The inquiry into the authority under which a criminal prosecution was taken thus does not require passing judgment on whether a prosecuting entity is "sovereign" in the sense of having "[s]upreme dominion, authority, or rule." *Sovereignty*, BLACK'S LAW DICTIONARY (10th ed. 2014).

Indeed, under this Court's precedent, it makes no difference to the applicability of the Double Jeopardy Clause whether an entity is "sovereign" in

some respect. In *Waller v. Florida*, the Court determined that Florida and its municipality were not "dual sovereigns" for double jeopardy purposes even though Florida law "treat[ed] municipalities and the State as separate sovereign entities." 397 U.S. 387, 391 (1970). Conversely, any "sovereignty" attributed to a prosecuting authority for purposes of the double jeopardy analysis bears no relation to the traditional concept of sovereignty.

Petitioner agrees that "sovereignty" for double jeopardy purposes is a separate issue from whether an entity is sovereign in a fuller sense. In its view, to confuse the "sovereignty" required to avoid application of the Double Jeopardy Clause with Puerto Rico sovereignty would be a "semantic trap" that overreads the fact that "the relevant doctrine is called the dual *sovereignty* doctrine." Pet. Br. 40 (criticizing Puerto Rico Supreme Court and 11th Circuit for "conclud[ing] that Puerto Rico could not invoke th[e] [dual sovereignty] doctrine unless it could claim to be a 'sovereign' for all purposes"). Thus, while *amici* and Petitioner disagree on the ultimate source of Puerto Rico's prosecutorial authority, there is no dispute that a double jeopardy analysis keyed to pronouncements of sovereignty writ large would be an "approach [that] cannot be squared with this Court's dual sovereignty jurisprudence." Pet. Br. 40.

B. A Narrow Ruling Avoids Unintended Consequences

Given Petitioner's concession that no pronouncement on Puerto Rico's constitutional status as a territory or on Congress's plenary authority to

govern is necessary to resolve this case, the Court should be careful to confine its resolution to the narrow question presented. A broader ruling—or even dicta—that disturbs the settled constitutional principles governing the territory of Puerto Rico, or otherwise opines on issues of sovereignty writ large, could have far-ranging political and legal consequences, some of which *amici* underscore below. Those consequences are easily avoided by an opinion, to the extent it recognizes any measure of dual sovereignty at all, that hews in no uncertain terms to the double jeopardy analysis—and goes no further.

1. Political Consequences

As Petitioner openly acknowledges (Br. 45), there is a "lively debate" in the territory regarding "the island's political status." The vigor of that debate, as well as its political nature, can hardly be overstated. *See, e.g.*, Pet. App. 241a (Rodríguez Rodríguez, J., dissenting) (asserting that "majority's objective is to advance its ideology on the status of Puerto Rico"). "The issue of Puerto Rico's status has been discussed and debated as far back as the Treaty of Paris"—including through four plebiscites, presidential ad hoc advisory groups and task forces, and legislative proposals. REPORT BY THE PRESIDENT'S TASK FORCE ON PUERTO RICO'S STATUS 19-21 (2011); *see, e.g.*, H.R. 856, 105th Cong. (1997) (providing "a process leading to full self-government for Puerto Rico"). And each plebiscite has spawned further debate over the meaning of the status options presented on the ballot and the meaning of the results. *See* R. SAM GARRETT, CONG. RESEARCH SERV., RL32933, POLITICAL STATUS OF PUERTO RICO: OPTIONS FOR CONGRESS 33 (2011) (documenting, in

notes d, g, and i, the "arguabl[e]" level of sovereignty contained in various status options presented to voters in 1967, 1993, and 1998).

Most recently, in a 2012 plebiscite, the U.S. citizens of Puerto Rico rejected their current territorial status (54% to 46%) and chose statehood from among the alternatives by 61%. R. SAM GARRETT, CONG. RESEARCH SERV., R42765, PUERTO RICO'S POLITICAL STATUS AND THE 2012 PLEBISCITE: BACKGROUND AND KEY QUESTIONS 8 (2013). Congress in 2014 appropriated $2.5 million to the territory for "objective, nonpartisan voter education about, and a plebiscite on, options that would resolve Puerto Rico's future political status." Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, 128 Stat. 5, 61.

The territory's status thus "remains of overwhelming importance to the people of Puerto Rico, and there remains a great deal to be said on the topic." REPORT, *supra*, at 23. That is for good reason. Congressional authorization of a territorial constitution for self-government in local civil affairs not otherwise governed by federal law has not changed the historically and legally unprecedented political condition in which *Balzac* left the territory 93 years ago. *See* pp. 7-8, *supra*. Whether the territory is treated by federal statute or federal judicial rulings "like a sovereign" or "like a State," *Balzac* defines the political status and civil rights of U.S. citizens in the territory in terms that deny permanent incorporation into the Union, application of the Constitution by its own force, and the right to participate meaningfully in federal governance—all paramount rights of U.S. citizenship enjoyed by citizens in the 50 States.

This Court has long made clear that the resolution of the status debate is "wholly a political question" that falls exclusively within Congress's province. "It cannot be denied that *** the sovereignty of the United States may be extended over foreign territory to remain paramount until, *in the discretion of the political department of the government of the United States*, it be relinquished." *Downes*, 182 U.S. at 312, 344 (White, J., concurring) (emphasis added). Indeed, were the Court to wade into this debate, it would be "an act of usurpation [of] purely political functions." *Id.* at 344. There is thus no legal basis—and given the ongoing political dialogue, no compelling reason—for this Court to enter that debate through this case. As a practical matter, any statement the Court makes suggesting something beyond territorial status for Puerto Rico—no matter how indirect or unintentional—is fraught with potential political ramifications and jeopardizes the effectiveness of Puerto Rico's next plebiscite.

2. Legal Consequences

Beyond the potential political consequences, a broad ruling could call into question several long-settled legal conclusions grounded in Puerto Rico's territorial status under the Constitution. *Amici* provide here just a few examples.

First, a suggestion that the territory of Puerto Rico exercises State-like sovereignty under the Constitution would undermine the beleaguered-yet-entrenched legal distinction between unincorporated and incorporated territories. *See* pp. 7-8, *supra*. As a result, this Court could be called upon to revisit the

extent to which provisions of the federal Constitution applicable to States are relevant to the territory.

Take one example: for nearly a century, Congress has declined to extend federal "internal revenue" laws to the territory of Puerto Rico, 48 U.S.C. § 734; *see Examining Bd. of Eng'rs*, 426 U.S. at 589-590 & n.22, despite the fact that the Tax Uniformity Clause of the Constitution requires that "all Duties, Imposts and Excises shall be uniform throughout the United States," U.S. CONST. art. I, § 8, cl. 1. That legislative choice is grounded in this Court's determination that the Tax Uniformity Clause "was not applicable to Congress in legislating for Porto Rico" because Puerto Rico "had not been incorporated into the United States, but was merely appurtenant thereto as a possession." *Downes*, 182 U.S. at 342 (White, J., concurring). A decision that casts doubt on Puerto Rico's status as an unincorporated territory in turn casts doubt on Puerto Rico's longstanding taxation regime.

Second, this Court has held that the territory of Puerto Rico lacks authority over foreign affairs. *See Torres*, 442 U.S. at 473 ("Puerto Rico has no sovereign authority to prohibit entry into its territory; as with all international ports of entry, border and customs control for Puerto Rico is conducted by federal officers."). Yet, at times, the territorial government has presented itself to foreign countries as a sovereign entity.

In 2003, for example, negotiations between the "unincorporated territory" of Puerto Rico and Belize prompted the following response from the U.S. Department of State: "The U.S. federal government

has full responsibility for the conduct of foreign relations of all areas subject to United States jurisdiction, including all U.S. states, territories, and possessions. Accordingly, the Department reviews any proposed participation by a U.S. territory or possession in international bodies, or signing of documents (including agreements) with other nations." Memorandum from Colin Powell, U.S. Secretary of State, to the Embassy of Belize (May 16, 2003). Any language that could be interpreted to imbue Puerto Rico with independent sovereignty would be at odds with those authorities.

Third, over the past two decades, the First Circuit has confronted a series of challenges by U.S. citizens-residents of Puerto Rico claiming that they are constitutionally entitled to vote in the presidential election and for members of the U.S. House of Representatives with full voting privileges. Each time, the First Circuit has rejected those challenges on the straightforward ground that "Puerto Rico is concededly not a state." *Igartua I*, 32 F.3d at 9-10. With respect to the election of the President and Vice-President, the court reasoned that "Article II of the Constitution explicitly provides that the President of the United States shall be elected by electors who are chosen *by the States*." *Igartua de la Rosa v. United States*, 229 F.3d 80, 83-84 (1st Cir. 2000) (applying *Igartua I*); *Igartua-de la Rosa v. United States*, 417 F.3d 145, 146-148 (1st Cir. 2005) (en banc) (same). Likewise, with respect to members of Congress, the court reasoned that "the text of the Constitution, in several provisions, plainly limits the right to choose members of the House of Representatives to citizens of a state," which Puerto

Rico is not. *Igartua v. United States* (*Igartua IV*), 626 F.3d 592, 595 (1st Cir. 2010).

As the First Circuit emphasized, "these provisions of the constitutional text are deliberate and go to the heart of the Constitution," and "may not be upset." *Igartua IV*, 626 F.3d at 595. This Court should avoid any statements comparing Puerto Rico to States that could muddy those constitutional principles and their application to an otherwise settled issue.

CONCLUSION

For the foregoing reasons, the decision of the Puerto Rico Supreme Court should be affirmed. To the extent this Court is inclined to reverse, it should expressly confine any suggestion of the territory's "sovereignty" to the unique double jeopardy context.

Respectfully submitted.

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In The

Supreme Court of the United States

COMMONWEALTH OF PUERTO RICO,

Petitioner,

v.

LUIS M. SÁNCHEZ VALLE AND
JAIME GÓMEZ VÁZQUEZ,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Puerto Rico

BRIEF FOR *AMICUS CURIAE* FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS – MIAMI CHAPTER IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

Founded in 1963, the Miami Chapter of the Florida Association of Criminal Defense Lawyers (FACDL-Miami) is one of the largest bar associations in Miami-Dade County. The 450-plus attorneys in the Miami Chapter include private practitioners and public defenders who are committed to preserving fairness in the state and federal criminal justice systems and defending the rights of individuals guaranteed by the Constitution of the United States.

SUMMARY OF THE ARGUMENT

Puerto Rico (Petitioner) asks the Court to overrule *Puerto Rico v. Shell Co. (P.R.)*, 302 U.S. 253 (1937), so that it may prosecute two defendants (Respondents) for crimes for which they have already been convicted in federal court. Puerto Rico asserts that it is, like one of the fifty States, a "sovereign" distinct from the federal government, thus triggering the so-called "dual sovereignty" exception to the Double Jeopardy Clause of the Fifth Amendment. Petitioner's Brief at 22 ("[T]he Double Jeopardy Clause bars successive prosecution by the *same*

[1] The parties have consented to the filing of this brief, and their written consents are on file with the Clerk of this Court. No counsel for a party authored this brief in whole or in part, and no person other than *amicus* and its counsel has made any monetary contribution to the preparation or submission of this brief.

sovereign, but does not apply to successive prosecution by *different* sovereigns.").

But Petitioner's position is based on "this Court's precedents dating back well into the nineteenth century," *id.* (citing, *inter alia*, *Abbate v. United States*, 359 U.S. 187, 193-94 (1959); *Bartkus v. Illinois*, 359 U.S. 121, 128-39 (1959); *United States v. Lanza*, 260 U.S. 377, 382 (1922)), at a time when the Court's non-incorporation jurisprudence prevailed, and the constitutional prohibition against double jeopardy did not bar the States from twice prosecuting a defendant for the same offense. *See Palko v. Connecticut*, 302 U.S. 319 (1937). In *Benton v. Maryland*, 395 U.S. 784 (1969), however, the Court overruled *Palko*. Although the double jeopardy prohibition of the Fifth Amendment now applies to States through the Fourteenth Amendment, the Court has continued to apply the dual sovereignty doctrine in double jeopardy cases, *e.g.*, *Heath v. Alabama*, 474 U.S. 82, 88 (1985), without squarely addressing whether it continues to have force in light of *Benton*. Numerous judges of the federal courts of appeal have extended invitations to the Court to weigh in on the dual sovereignty question, particularly in light of its modern incorporation jurisprudence. *E.g.*, *United States v. Berry*, 164 F.3d 844, 847 n.4 (3d Cir. 1999) ("[W]e and other Courts of Appeal have suggested that the growth of federal criminal law has created a need for the Supreme Court to reconsider the application of

the dual sovereignty rule to situations such as this.").[2] They have noted decades worth of "judicial and

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[2] *Accord United States v. Grimes*, 641 F.2d 96, 101 (3d Cir. 1981) ("[A] reexamination of *Bartkus* may be in order, since questions may be raised regarding both the validity of this formalistic conception of dual sovereignty and the continuing viability of the opinion's interpretation of the Double Jeopardy Clause with respect to the states."); *United States v. All Assets of G.P.S. Auto. Corp.*, 66 F.3d 483, 499 (2d Cir. 1995) (Calabresi, J., concurring) (welcoming "a new look by the High Court at the dual sovereignty doctrine and what it means today for the safeguards the Framers sought to place in the Double Jeopardy Clause."); *Turley v. Wyrick*, 554 F.2d 840, 842 (8th Cir. 1977) (Lay, J., concurring) ("I am not convinced that subsequent decisions of the Supreme Court have not fully eroded *Bartkus* and *Abbate* and that the double jeopardy defense should be sustained. . . . As an intermediate appellate judge I realize it is not my singular role to express opinion contrary to established law. However, recognition of this judicial discipline should not prevent one from expressing dismay in the use of stare decisis to perpetuate an injustice."); *see also United States v. Barrett*, 496 F.3d 1079, 1119 (10th Cir. 2007) ("To the extent Barrett questions the continued viability of the dual sovereignty doctrine . . . , this court is bound to follow *Lanza* and its progeny until such time as the Supreme Court overrules it."); *United States v. Jackson*, 327 F.3d 273, 295 (4th Cir. 2003) ("Unless and until the Supreme Court overrules its existing precedents, we are bound to conclude that the federal prosecution under federal law is not barred by the fact that the defendant was previously tried and convicted under State law on the basis of the same facts."); *United States v. Singleton*, 16 F.3d 1419, 1429 n.48 (5th Cir. 1994) ("[A]mici curiae[ ] invite us to reconsider the constitutionality of the 'dual sovereignty' exception to double jeopardy in this case. We decline the invitation. . . . Even if the constitutionality of the 'dual sovereignty' doctrine were properly before us, however, we are bound by Supreme Court precedent upholding the doctrine. . . . It is to that Court amici must address their arguments.").

scholarly criticism" of the doctrine. *United States v. Tirrell*, 120 F.3d 670, 677 (7th Cir. 1997).[3]

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[3] Published critiques of the dual sovereignty doctrine date back to 1932 and have continued into this century. *E.g.*, J.A.C. Grant, *The Lanza Rule of Successive Prosecutions*, 32 COLUM. L. REV. 1309 (1932); Walter T. Fisher, *Double Jeopardy, Two Sovereignties and the Intruding Constitution*, 28 U. CHI. L. REV. 591 (1961); Lawrence Newman, *Double Jeopardy and the Problem of Successive Prosecution: A Suggested Solution*, 34 S. CAL. L. REV. 252 (1961); Harlan R. Harrison, *Federalism and Double Jeopardy: A Study in the Frustration of Human Rights*, 17 U. MIAMI L. REV. 306 (1963); George C. Pontikes, *Dual Sovereignty and Double Jeopardy: A Critique of* Bartkus v. Illinois *and* Abbate v. United States, 14 CASE W. RES. L. REV. 700 (1963); Note, *Double Prosecution by State and Federal Governments: Another Exercise in Federalism*, 80 HARV. L. REV. 1538 (1967); Richard D. Boyle, *Double Jeopardy and Dual Sovereignty: The Impact of* Benton v. Maryland *on Successive Prosecutions for the Same Offense by State and Federal Governments*, 46 IND. L.J. 413 (1971); James E. King, Note, *The Problem of Double Jeopardy in Successive Federal-State Prosecutions: A Fifth Amendment Solution*, 31 STAN. L. REV. 277 (1979); Note, *Double Jeopardy and Federal Prosecution After State's Jury Acquittal*, 80 MICH. L. REV. 1073 (1982); Ronald J. Allen & John P. Ratnaswamy, Heath v. Alabama*: A Case Study of Doctrine and Rationality in the Supreme Court*, 76 J. CRIM. L. & CRIMINOLOGY 801 (1985); Kenneth M. Murchison, *The Dual Sovereignty Exception to Double Jeopardy*, 14 N.Y.U. REV. L. & SOC. CHANGE 383 (1986); Evan Tsen Lee, *The Dual Sovereignty Exception to Double Jeopardy: In the Wake of* Garcia v. San Antonio Metropolitan Transit Authority, 22 NEW ENG. L. REV. 31 (1987); Michael A. Dawson, Note, *Popular Sovereignty, Double Jeopardy, and the Dual Sovereignty Doctrine*, 102 YALE L.J. 281 (1992); Daniel A. Braun, *Praying to False Sovereigns: The Rule Permitting Successive Prosecutions in the Age of Cooperative Federalism*, 20 AM. J. CRIM. L. 1 (1992); Paul G. Cassell, *The Rodney King Trials and the Double Jeopardy Clause: Some*

(Continued on following page)

Before the Court accepts Petitioner's invitation to re-examine (and overrule) *Shell*, which turns on the political question of Puerto Rico's status vis-a-vis the federal government and the fifty States, the Court should first re-examine the dual sovereignty doctrine, especially in light of the expanded federalization of crime, in an age of cooperative federalism between federal and state governments. *Amicus* submits, consistent with the observations of numerous jurists and commentators, that the Court should abandon the dual sovereignty doctrine and hold that the Fifth Amendment's Double Jeopardy Clause bars a successive prosecution for the same crime, even if initiated by a different prosecuting authority. In all events, recognizing Puerto Rico as a sovereign distinct from the federal government would be incompatible with a century of precedent from this Court, and a century of actions by both the Legislative and Executive Branches.

Observations on Original Meaning and the ACLU's Schizophrenic Views of the Dual Sovereignty Doctrine, 41 UCLA L. REV. 693 (1994); Sandra Guerra, *The Myth of Dual Sovereignty: Multijurisdictional Drug Law Enforcement and Double Jeopardy*, 73 N.C. L. REV. 1159 (1995); Edwin Meese III, *Big Brother on the Beat: The Expanding Federalization of Crime*, 1 TEX. REV. L. & POL. 1 (1997); Robert Matz, *Dual Sovereignty and the Double Jeopardy Clause: If At First You Don't Convict, Try, Try Again*, 24 FORDHAM URB. L.J. 353 (1997); David Bryan Owsley, *Accepting the Dual Sovereignty Exception to Double Jeopardy: A Hard Case Study*, 81 WASH. U.L.Q. 765, 767 (2003).

ARGUMENT

I. The Dual Sovereignty Doctrine Should Be Abandoned; The Double Jeopardy Clause Should Bar Successive Prosecutions for the Same Offense, Even if by Different Sovereigns[4]

The prohibition against being twice tried for the same offense is an ancient restraint on governmental power deeply entrenched in our legal history. *See* Peter Westen & Richard Drubel, *Toward a General Theory of Double Jeopardy*, 1978 S. CT. REV. 81. It developed as a basic notion of fairness with roots traceable to the Hebrew Talmud. *See* Lawrence Newman, *Double Jeopardy and the Problem of Successive Prosecution: A Suggested Solution*, 34 S. CAL. L. REV. 252 (1961).

The Fifth Amendment's prohibition against subjecting a person "for the same offence to be twice put in jeopardy" originated in the English common law pleas of *autrefois acquit* and *autrefois convict*, which allowed a defendant to plead a prior acquittal or conviction in bar of a present prosecution. *See*

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[4] This section of the Argument draws from the briefs filed in earlier cases challenging the continued viability of the dual sovereignty doctrine. *See Roach v. Missouri*, 134 S. Ct. 118 (2013) (cert. denied) (Petition for Writ of Certiorari, No. 12-1394, 2013 WL 2352238); *United States v. Angleton*, 538 U.S. 946 (2003) (cert. denied) (Petition for Writ of Certiorari, No. 02-1233, 2003 WL 21699547); *United States v. Roman*, 608 F. App'x 694 (10th Cir. 2015) (successive federal conviction sustained) (Appellant's Opening Brief, No. 14-4126, 2015 WL 1508203).

United States v. Scott, 437 U.S. 82, 87 (1978). In 18th-century England, a criminal defendant could interpose these pleas regardless of whether the previous prosecution was brought by the same or different sovereigns. *See R. v. Roche*, 168 Eng. Rep. 169 (K.B. 1775) (holding that a Dutch acquittal for murder "would be a bar" to an English prosecution); *R. v. Hutchinson* (holding that an acquittal for murder in Portugal barred prosecution in England), *cited in Burrows v. Jemino*, 93 Eng. Rep. 815 (Ch. 1726) and *Beak v. Thyrwhit*, 87 Eng. Rep. 124, 125 (K.B. 1688) (both discussing *Hutchinson*, of which there is apparently no surviving report). English law remained the same into the twentieth century. *See R. v. Aughet*, 13 Cr. App. R. 101 (C.C.A. 1918).

The Framers included the Fifth Amendment's Double Jeopardy Clause in the Bill of Rights because they feared the specter of successive prosecutions. The first Congress decided that the provisions of the text should mirror the already well-established double-jeopardy principle. *See* 1 Annals of Cong. 781 (1789).

Notwithstanding the Double Jeopardy Clause's bar against twice subjecting a defendant to jeopardy for the same offense, the Court has permitted two prosecutions when brought by separate sovereigns – an application of the so-called dual sovereignty doctrine. Although "[t]o the Constitution of the United States the term SOVEREIGN is totally unknown," *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 454 (1793) (opinion of Wilson, J.) (all capitals in original), the

gist of the doctrine is that "two identical offenses are not the 'same offence' within the meaning of the Double Jeopardy Clause if they are prosecuted by different sovereigns." *Heath v. Alabama*, 474 U.S. 82, 92 (1985).

In three pre-Civil War cases (all decided before the Bill of Rights were held to apply to the States), the Court laid the foundation for the dual sovereignty doctrine in the context of successive prosecutions, but none of those cases involved actual – as opposed to hypothetical – successive prosecutions. *See Fox v. Ohio*, 46 U.S. (5 How.) 410 (1847); *United States v. Marigold*, 50 U.S. (9 How.) 560 (1850); *Moore v. Illinois*, 55 U.S. (14 How.) 13 (1852). Indeed, the first case, *Fox*, was based on *Barron v. City of Baltimore*, 32 U.S. (7 Pet.) 243 (1833), and the now-defunct view that the Double Jeopardy Clause placed no limits on state-government actions. And while the second case, *Marigold*, referenced "an offence against both the State and Federal governments," it stated that the same offense could be prosecuted by "either" rather than "both." In the third case, *Moore*, the Court rejected the argument that a prosecution under state law for harboring a fugitive slave was preempted by a federal statute, and only addressed the dual sovereignty doctrine in *dicta* while pondering the possibility that the defendant could be prosecuted by the federal government following his prosecution by the state government:

> The same act may be an offence or transgression of the laws of both. . . . *That either*

> *or both may (if they see fit) punish such an offender, cannot be doubted.* Yet it cannot be truly averred that the offender has been twice punished for the same offence; but only that by one act he has committed two offences, for each of which he is justly punishable. He could not plead the punishment by one in bar to a conviction by the other.

Moore, 55 U.S. (14 How.) at 20 (emphasis added).

The dual sovereignty doctrine, discussed as theoretical *dicta* in these antebellum opinions, was first squarely confronted in *United States v. Lanza*, 260 U.S. 377 (1922). The federal government indicted five defendants for bootlegging under the National Prohibition Act after they had been previously convicted for similar violations of state law. *See id.* at 378-79. The Court rejected the defendants' claim that successive prosecution was barred by the Double Jeopardy Clause. Borrowing *Barron*'s proposition that the Double Jeopardy Clause did not apply to the States, the Court concluded that the defendants committed two different offenses by the same act.

> It follows that an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each. The Fifth Amendment, like all the other guaranties in the first eight amendments, applies only to proceedings by the federal government, . . . and the double jeopardy therein forbidden is a second prosecution under authority of the

> federal government after a first trial for the same offense under the same authority.

Lanza, 260 U.S. at 382.

The Court again addressed the dual sovereignty doctrine in the double jeopardy context when it decided *Bartkus v. Illinois*, 359 U.S. 121 (1959), and *Abbate v. United States*, 359 U.S. 187 (1959). In *Bartkus*, the Court held that the Fourteenth Amendment did not bar a state prosecution following a prior federal conviction. And *Abbate* found that the Fifth Amendment did not prevent a federal prosecution following a state trial for the same offense. Both noted the then-prevailing view that the Fifth Amendment Double Jeopardy Clause did not bar the States from twice prosecuting a defendant for the same offense. In *Abbate*, the Court embraced the dual sovereignty doctrine as a necessary corollary to the federal system and expressly declined to overrule *Lanza*:

> Undesirable consequences would follow if *Lanza* were overruled. The basic dilemma was recognized over a century ago in *Fox v. State of Ohio*. As was there pointed out, if the States are free to prosecute criminal acts violating their laws, and the resultant state prosecutions bar federal prosecutions based on the same acts, federal law enforcement must necessarily be hindered. . . . But no one would suggest that, in order to maintain the effectiveness of federal law enforcement, it is desirable completely to displace state power to prosecute crimes based on acts which

> might also violate federal law. This would bring about a marked change in the distribution of powers to administer criminal justice, for the States under our federal system have the principal responsibility for defining and prosecuting crimes. Thus, unless the federal authorities could somehow insure that there would be no state prosecutions for particular acts that also constitute federal offenses, the efficiency of federal law enforcement must suffer if the Double Jeopardy Clause prevents successive state and federal prosecutions. Needless to say, it would be highly impractical for the federal authorities to attempt to keep informed of all state prosecutions which might bear on federal offenses.

Abbate, 359 U.S. at 195 (citations omitted); *accord Bartkus*, 359 U.S. at 137 ("Were the federal prosecution of a comparatively minor offense to prevent state prosecution of so grave an infraction of state law, the result would be a shocking and untoward deprivation of the historic right and obligation of the States to maintain peace and order within their confines. It would be in derogation of our federal system to displace the reserved power of States over state offenses by reason of prosecution of minor federal offenses by federal authorities beyond the control of the States."). Concerns about federalism, States' rights and the distinct federal-state interests animated those majority opinions.

Justice Black dissented in both cases, not convinced "that a State and the Nation can be considered

two wholly separate sovereignties for the purpose of allowing them to do together what, generally, neither of them can do separately." *Abbate*, 359 U.S. at 203 (Black, J., dissenting). He observed that the dual sovereignty doctrine was not imported from English law's double jeopardy jurisprudence. It was judicially conjured in *Fox* and *Marigold* to accommodate coexisting sovereigns in the American federal system.

> *Lanza* . . . seemed rather to rely on dicta in a number of past cases in this Court. These had assumed that identical conduct of an accused might be prosecuted twice, once by a State and once by the Federal Government, because the "offense" punished by each is in some, meaningful, sense different. The legal logic used to prove one thing to be two is too subtle for me to grasp.

Abbate, 359 U.S. at 202 (Black, J., dissenting). Concerned that the doctrine supplanted the individual's right to avoid successive prosecutions, Justice Black wrote:

> The Court apparently takes the position that a second trial for the same act is somehow less offensive if one of the trials is conducted by the Federal Government and the other by a State. Looked at from the standpoint of the individual who is being prosecuted, . . . it hurts no less for two "Sovereigns" to inflict it than for one.

Bartkus, 359 U.S. at 155 (Black, J., dissenting). Observing that "the Court's reliance on federalism

amounts to no more than the notion that, somehow, one act becomes two because two jurisdictions are involved," Justice Black implored that it be "discarded as a dangerous fiction." *Id.* at 158. He dismissed the majority's concern that "failure to allow double prosecutions would seriously impair law enforcement in both State and Nation" as premised on the "unwarranted assumption that State and Nation will seek to subvert each other's laws." *Id.* at 156. Drawing on principles of preemption, he explained that

> [t]he Federal Government is given power to act in limited areas only, but in matters properly within its scope it is supreme. It can retain exclusive control of such matters, or grant the States concurrent power on its own terms. If the States were to subvert federal laws in these areas by imposing inadequate penalties, Congress would have full power to protect the national interest, either by defining the crime to be punished and establishing minimum penalties applicable in both state and federal courts, or by excluding the States altogether.

Id. at 157; *see also id.* at 156 ("[M]ost civilized nations do not and have not needed the power to try people a second time to protect themselves even when dealing with foreign lands.").

From *Fox* in 1847 to *Bartkus* and *Abbate* in 1959, the dual sovereignty doctrine was formulated in an era when the Bill of Rights did not bind the States. The Court's non-incorporation jurisprudence controlled,

and the constitutional prohibition against double jeopardy did not yet bar the States from twice prosecuting or punishing a defendant for the same offense. *Palko v. Connecticut*, 302 U.S. 319 (1937). The Constitution was indifferent to successive State prosecutions.

But then came *Benton v. Maryland*, 395 U.S. 784 (1969), one of a series of post-*Bartkus* cases in which the Court held that protections in the Bill of Rights were applicable to the States through the Due Process Clause of the Fourteenth Amendment:

> [T]he double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage, and that it should apply to the States through the Fourteenth Amendment. Insofar as it is inconsistent with this holding, *Palko v. Connecticut* is overruled.

Id. at 794.

Outside of the double jeopardy context, the Court began to recognize that the application of individual rights to the States "operated to undermine the logical foundation" for a dual sovereignty rule. *Elkins v. United States*, 364 U.S. 206, 214 (1960).

For example, after holding that the Fourth Amendment applied to the states, *see Wolf v. Colorado*, 338 U.S. 25 (1949), the Court held that evidence obtained in unlawful searches by state officials was inadmissible in federal criminal trials. *See Elkins*, 364 U.S. at 223. Echoing Justice Black's dissents in

Bartkus and *Abbate*, the Court reasoned that evidence seized illegally by one sovereign could not be turned over to another sovereign: "[t]o the victim it matters not whether his constitutional right has been invaded by a federal agent or by a state officer." *Elkins*, 364 U.S. at 215.

And in *Malloy v. Hogan*, 378 U.S. 1 (1964), and *Murphy v. Waterfront Comm'n*, 378 U.S. 52 (1964), the Court discarded the separate-sovereignty theory of self-incrimination. The Court explained that "there is no continuing legal vitality to, or historical justification for, the rule that one jurisdiction . . . may compel a witness to give testimony which could be used to convict him of a crime in another jurisdiction." *Murphy*, 378 U.S. at 77. The policies behind the privilege would be frustrated by the dual-sovereignty doctrine, which allowed a defendant to be "whipsawed into incriminating himself under both state and federal law even though the constitutional privilege against self-incrimination applied to each." *Id.* at 55 (quoting *Knapp v. Schweitzer*, 357 U.S. 371, 385 (1958) (Black, J., dissenting)).

Even after *Murphy* seemingly "abolished the two sovereignties rule," *Stevens v. Marks*, 383 U.S. 234, 250 (1966) (Harlan, J., concurring in part and dissenting in part), the Court continued to apply the dual sovereignty doctrine in the double jeopardy context. *See, e.g.*, *Heath v. Alabama*, 474 U.S. 82 (1985) (authorizing successive prosecutions by two different states); *see also, e.g.*, *United States v. Lara*, 541 U.S. 193, 199 (2004) ("We assume, as do the

parties, that Lara's double jeopardy claim turns on the answer to the 'dual sovereignty' question."); *Waller v. Florida*, 397 U.S. 387 (1970) (state and its municipality not separate sovereigns under the doctrine). The Court reaffirmed the holdings of *Lanza*, *Bartkus*, and *Abbate* without addressing the effect of its incorporation decisions in *Elkins*, *Malloy*, *Murphy*, and *Benton* on the continuing viability of the dual sovereignty doctrine. As one commentator explained:

> Whereas *Elkins* consciously built on *Wolf*'s application of Fourth Amendment principles against states to overturn the silver platter doctrine, and *Murphy* explicitly built on *Malloy*'s incorporation of the Incrimination Clause to overturn *Feldman*, the Court never chose to build on *Benton*'s incorporation of the Double Jeopardy Clause to overturn *Bartkus* and *Abbate*. The Court has never explained – or even focused on – this anomaly.
>
> The Supreme Court, in decisions such as *Elkins* and *Murphy*, appeared to be moving steadily towards Justice Black's position, but never took the final step of discarding the dual sovereignty doctrine altogether. As we have seen, incorporation undermined a central justification for the dual sovereignty doctrine. Indeed, *Elkins* and *Murphy* stand for the propositions that (1) the Fourteenth Amendment's emphasis on individual rights against all government trumps abstract notions of federalism, and (2) the federal and state governments should not be allowed to

> do in tandem what neither could do alone. Yet the dual sovereignty doctrine is still alive and well in double jeopardy cases, in seeming violation of these propositions.

Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 COLUM. L. REV. 1, 15-16 (1995).

In an opinion authored by Judge Adams, the Third Circuit explicitly encouraged reconsideration of the dual sovereignty "construct," which the Court had previously "deemed necessary in order to protect arguably separate governmental interests in law enforcement." *United States v. Grimes*, 641 F.2d 96, 101 (3d Cir. 1981). Judge Adams argued that *Bartkus* "appears open to question from two perspectives one of evolving constitutional principle; one of historical precedent." *Id.* at 101. Suggesting that the Court consider a "retreat from a rigid doctrine of dual sovereignty," *id.* at 102, Judge Adams opined that "an important predicate of the *Bartkus* opinion that the Fifth Amendment Double Jeopardy provision does not bind the states has been undercut by subsequent constitutional developments." *Id.* at 101.

> The question becomes, therefore, whether successive federal or successive state proceedings can be validly distinguished from successive federal-state proceedings. And in the wake of *Benton*, which entails the equivalent enforcement of the Double Jeopardy Clause against state and federal governments, any conceptual difference is difficult to support.

* * *

> Whenever a constitutional provision is equally enforceable against the state and federal governments, it would appear inconsistent to allow the parallel actions of state and federal officials to produce results which would be constitutionally impermissible if accomplished by either jurisdiction alone.

Id. at 102.

Judge Adams observed that *Bartkus* relied on case law pre-dating the Fourteenth Amendment, and long before "the present reality of a greatly expanded federal criminal law." *Id.* Most of the old cases, including *Fox*, "did not actually involve multiple prosecutions but simply raised the question whether both state and federal governments could make the same conduct a crime." *Id.* at 102-03. He found problematic the *Bartkus* Court's reliance on *Moore v. Illinois*, a case that "concerned the validity of state fugitive slave legislation . . . a politically freighted issue," leading him to conclude that "the Court's statement that a citizen owes allegiance to two sovereigns and may be liable to punishment for an infraction of the laws of either should be read with considerable caution." *Id.*

And Judge Adams described *Lanza* as "circumscribed by historical peculiarities,"

> an anomaly from the perspective of federalism because it involved the Eighteenth (Prohibition) Amendment . . . unique in having

> established a hybrid terrain an area of concurrent state and national power where the federal government could not, should it desire, assert its supremacy. Extrapolation or generalizations regarding double jeopardy law created in such an unusual context would therefore appear unwarranted.

Id. at 103-04. To Judge Adams's view, "developments in the application of the Bill of Rights to the states, consequent alterations in the system of dual sovereignty, and the historic idiosyncracies of various of the precedents upon which *Bartkus* relie[d] may deprive the opinion of much of its force." *Id.* at 104; *see also United States v. Frumento*, 563 F.2d 1083, 1092 (3d Cir. 1977) (Aldisert, J., dissenting) ("I am of the view that *Abbate* was wrongly decided in 1959. The majority opinion never came to grips with Justice Black's analysis in dissent, joined by Chief Justice Warren and Justice Douglas, and no developing doctrine in the intervening eighteen years has persuaded me to alter my original views.").

A decade later, Judge Calabresi penned a concurrence in *United States v. All Assets of G.P.S. Auto. Corp.*, 66 F.3d 483 (2d Cir. 1995), which he titled, *Rethinking the Dual Sovereignty Doctrine*. *Id.* at 496-97 and n.13. Judge Calabresi began by observing that "since its very first application in *Lanza*, the dual sovereignty doctrine has been strongly criticized . . . from an originalist point of view[, for] its jurisprudential flaws[, as] unfaithful to the Fifth Amendment's

historical roots [and] for relying on a notion of federalism that is inconsistent with other Supreme Court holdings." *Id.* at 497. He observed further that the doctrine emerged "during prohibition when there was considerable fear of state attempts to nullify federal liquor laws, as well as the doctrine's rebirth just at the time when state attempts to nullify federal desegregation laws and orders were at their height." *Id.* Admitting the important interest in a "sovereign's ability to enforce its own laws as it wishes," Judge Calabresi concluded nevertheless that "it is hard to justify limiting the reach of the Bill of Rights, adopted as it was to protect individual rights and liberties against governmental encroachment, on no stronger grounds than the relative cumbersomeness of plausible alternative measures that would protect the interests of the sovereigns involved." *Id.* at 498. He found it "difficult to accept generalized statements of sovereign interests as justifying the Clause's inapplicability to successive prosecutions by different governments." *Id.*

Judge Calabresi explained that his views were influenced by "the dramatic changes that have occurred in the relationship between the federal government and the states since the time of *Bartkus* and *Abbate*, changes that have made what was then perhaps acceptable, or at least tolerable, far more dangerous today." *Id.* at 498. Since 1959, "the scope of federal criminal law has expanded enormously. And the number of crimes for which a defendant may be made subject to both a state and a federal prosecution

has become very large." *Id.* Quoting generously from Judge Adams's opinion in *Grimes* a decade earlier, Judge Calabresi wrote:

> the recent expansion of federal criminal jurisdiction magnifies the impact of *Bartkus* and *Abbate*, thus rendering a reassessment of those decisions timely from a practical standpoint as well, since permitting successive state-federal prosecutions for the same act appears inconsistent with what is a most ancient principle in western jurisprudence – that the government may not twice place a person in jeopardy for the same offense.

Id. at 498-99 (quotation marks omitted). As well, "[t]he degree of cooperation between state and federal officials in criminal law enforcement has . . . reached unparalleled levels in the last few years," which "should cause one to wonder whether it makes much sense to maintain the fiction that federal and state governments are so separate in their interests that the dual sovereignty doctrine is universally needed to protect one from the other." *Id.* at 499. Judge Calabresi concluded his concurrence by welcoming "a new look by the High Court at the dual sovereignty doctrine and what it means today for the safeguards the Framers sought to place in the Double Jeopardy Clause." *Id.*

Indeed, joint efforts between state and local authorities have increased exponentially in recent years, fueled by Congressional expansion of federal law into state-enforcement areas. An American Bar

Association task force concluded that "[a] complex layer is being added to the overall criminal justice scheme, dramatically superimposing federal crimes on essentially localized conduct already criminalized by the states." James A. Strazzella, *Task Force on Federalization of Criminal Law*, 1998 A.B.A. CRIM. JUSTICE SEC. REP. 18.

Congress encourages state and federal law enforcement to function as a unit, bound together by information, technology, financial incentives, contractual arrangement, and statutory mandate. Congress adopted the Comprehensive Crime Control Act of 1984, federalizing many offenses that were traditionally enforced by state officials and expanding the roles of joint-jurisdictional task forces. *See also* 21 U.S.C. § 873 (authorizing the Attorney General to transfer forfeited property to any federal, state, or local agency that participated directly in the seizure or forfeiture of the property). Courts have approved such collaboration. *See United States v. Davis*, 906 F.2d 829, 831 (2d Cir. 1990) ("[C]ooperation between federal and local agencies has become increasingly important and increasingly commonplace."); *United States v. Jordan*, 870 F.2d 1310, 1313 (7th Cir. 1989) (finding nothing more than "commendable cooperation between state and federal law enforcement officials"); Daniel A. Braun, *Praying to False Sovereigns: The Rule Permitting Successive Prosecutions in the Age of Cooperative Federalism*, 20 AM. J. CRIM. L. 1, 77, n.351 (1992).

Dual sovereignty is an out-of-date judicial construct fashioned in an era when the states and the federal government acted as two separate sovereigns pursuing *conflicting* criminal-law interests. Each had a different focus and agenda in law enforcement. Now, joint task forces, shared resources and combined training are common. In this new "age of 'cooperative federalism,' where the federal and state governments are waging a united front against many types of criminal activity," *Murphy*, 378 U.S. at 55-56, state and federal law enforcement routinely work as partners, not as competing sovereigns. "[A] sweeping post-incorporation assault on dual sovereignty might insist that in a world where federal and state governments generally are presumed to, and do indeed, cooperate in investigating and enforcing criminal law, they should also be obliged to cooperate in hybrid adjudication to prevent ordinary citizens from being whipsawed." Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 COLUM. L. REV. 1, 48 (1995).

Given that the centuries-old protection against Double Jeopardy is "intrinsically personal," *United States v. Halper*, 490 U.S. 435, 447 (1989), the interest in allocating criminal law enforcement between federal and state power – if it ever justified the dual-sovereignty doctrine – must now give way. This is particularly true given the historical circumstances surrounding so many of the Court's dual sovereignty cases. *Moore* involved the "politically freighted" issue of fugitive slave laws, for which the Court may have

been concerned about exacerbating sectional tension between the North and South. *See Grimes*, 641 F.2d at 103. *Lanza* centered on a federal bootlegging prosecution at a time "when there was considerable fear of state attempts to nullify federal liquor laws." *G.P.S. Auto.*, 66 F.3d at 497. *Bartkus* and *Abbate* were handed down at the same time the Court, in *Cooper v. Aaron*, 358 U.S. 1 (1958), was confronting state recalcitrance in enforcing federal desegregation decrees.

The double jeopardy bar was always historically understood to *encompass*, *not exempt*, prosecutions by separate sovereigns. Two prosecutions for the same crime, even if by different sovereigns, is contrary to millennia of jurisprudence. "Even in the Dark Ages, when so many other principles were lost, the idea that one trial and one punishment were enough remained alive through the canon law and the teachings of early Christian writers." *Bartkus*, 359 U.S. at 151-52 (Black, J., dissenting).

Dual sovereignty dogma overlooks the lengthy and significant evidence suggesting that English common law, as well as colonial American laws, did not permit retrial by another sovereign. *E.g.*, Paul G. Cassell, *The Rodney King Trials and the Double Jeopardy Clause: Some Observations on Original Meaning and the ACLU's Schizophrenic Views of the Dual Sovereignty Doctrine*, 41 UCLA L. REV. 693, 714-15 (1994) (noting that "[i]t seems reasonably clear that at the time of the framing of the Double Jeopardy Clause, the general view of the common-law

cases [] was that they allowed a defendant to plead an acquittal as a bar in a latter case" and that "a good case can be made that the Framers of the Double Jeopardy Clause did not intend to permit each of two sovereigns to prosecute a defendant for the same offense").[5]

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[5] *Accord* Ronald J. Allen & John P. Ratnaswamy, Heath v. Alabama*: A Case Study of Doctrine and Rationality in the Supreme Court*, 76 J. CRIM. L. & CRIMINOLOGY 801, 810 (1985) (suggesting that "it was the intention of the framers to implement their understanding of the common law of Great Britain and the former colonies" and "the available evidence suggests that at the time of the adoption of the Constitution and the Bill of Rights, the common law was understood to apply the double jeopardy bar to successive prosecutions by different sovereigns"); Francis Wharton, *A Treatise on the Criminal Law of the United States* 137 (1846) (prosecution "will be sufficient to preclude any subsequent proceedings before every other court"); 1 James Kent, *Commentaries of American Law* 374 (1826) (where state and federal courts have concurrent jurisdiction, "the sentence of either court, whether of conviction or acquittal, might be pleaded in bar of the prosecution before the other"); 1 Joseph Chitty, *A Practical Treatise on the Criminal Law* 458 (1816) (expressly noting that an acquittal or conviction "will be sufficient to preclude any subsequent proceedings before every other tribunal"); Leonard MacNally, *The Rules of Evidence on Pleas of the Crown* 428 (1802); 4 William Blackstone, *Commentaries on the Laws of England* 329 (1770) ("[A]ny court having competent jurisdiction of the offence" could support a double jeopardy bar.); 2 William Hawkins, *A Treatise of the Pleas of the Crown* 372 (1721) ("[A]n Acquittal in any Court whatsoever, which has a Jurisdiction of the Cause, is as good a Bar of any subsequent Prosecution for the same Crime, as an Acquittal in the Highest Court.").

The criticism of the dual sovereignty doctrine is exemplified in the commentary of former Attorney General Edwin Meese, who points out that it not only "violates the spirit of the Double Jeopardy Clause, especially when one considers the original intent of our Constitutional Framers," but it is also inconsistent with the evolution of this Court's incorporation of the Bill of Rights as binding upon the States. *See, e.g.*, Edwin Meese III, *Big Brother on the Beat: The Expanding Federalization of Crime*, 1 TEX. REV. L. & POL. 1, 8, 14, 18, 21-22 (1997). "By ignoring the common law rule and the original intent of the Constitutional Framers, the Supreme Court has misconstrued and weakened one of America's most important constitutional protections." *Id.* at 22. The former Attorney General and state prosecutor assailed the doctrine as fundamentally "unfair," and a violation of "the spirit of the Double Jeopardy Clause," and urged that "the Supreme Court should abolish the dual sovereign exception to the Double Jeopardy Clause." *Id.* at 9, 18, 23.

II. The Dual Sovereignty Doctrine Does Not Apply to Puerto Rico

To the extent that the dual sovereignty doctrine permits successive prosecutions for the same crime by different sovereigns, recognizing Puerto Rico as a sovereign distinct from the federal government would be incompatible with a century of precedent from this Court, and a century of actions by both the Legislative and Executive Branches.

Since 1907, this Court has consistently held that the double jeopardy protections of the Fifth Amendment bar multiple prosecutions by federal and territorial prosecutors for the same offense. *See, e.g.*, *Grafton v. United States*, 206 U.S. 333, 354-55 (1907) (Philippines); *Puerto Rico v. Shell Co. (P.R.)*, 302 U.S. 253, 264-65 (1937) (Puerto Rico). This Court has cited, and relied upon these rulings, in numerous double jeopardy cases. *See, e.g.*, *Heath v. Alabama*, 474 U.S. 82, 88-89 (1985); *United States v. Wheeler*, 435 U.S. 313, 320-21 (1978) ("When a territorial government enacts and enforces criminal laws . . . it is not acting as an independent political community like a State, but as 'an agency of the federal government.'") (quoting *Domenech v. Nat'l City Bank*, 294 U.S. 199, 204-05 (1935) ("Puerto Rico, an island possession, like a territory, is an agency of the federal government, having no independent sovereignty comparable to that of a state in virtue of which taxes may be levied.")); *Waller v. Florida*, 397 U.S. 387, 393 (1970) ("The legal consequence of that [territorial] relationship was settled in *Grafton* . . ., where this Court held that a prosecution in a court of the United States is a bar to a subsequent prosecution in a territorial court, since both are arms of the same sovereign.").[6]

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[6] As noted by the Puerto Rico Supreme Court, Pet. App. 29a, federal courts in the District of Columbia have likewise concluded that the Double Jeopardy Clause bars successive criminal prosecutions of federal and District of Columbia offenses in district courts because such prosecutions emanate from the same sovereign – namely, the federal government. *E.g.*,

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"Territory and Nation[ ] are not two separate sovereigns to whom the citizen owes separate allegiance in any meaningful sense, but one alone." *Wheeler*, 435 U.S. at 321. Indeed, in *Waller*, a unanimous Court found that the 1907 *Grafton* precedent applicable to territories like Puerto Rico "control[led]," and precluded recognition of municipalities as separate sovereigns. *Waller*, 397 U.S. at 394.[7] Just as the Puerto Rico Supreme Court was bound to follow this Court's precedent in arriving at its decision below, the application of *stare decisis* principles compels the affirmance of that decision.

The Court has never wavered in its holding that Puerto Rico is a territory of the United States subject to the Territories Clause. In the *Shell* opinion of 1937, the Court held that Puerto Rico is a territory, notwithstanding its status as an unincorporated territory,[8]

United States v. Sumler, 136 F.3d 188, 191 (D.C. Cir. 1998); *United States v. Jones*, 527 F.2d 817, 821 (D.C. Cir. 1975) (citing *Waller*, 397 U.S. 387).

[7] Justice Black joined the opinion, while adhering to his original objection to the dual sovereignty doctrine as expressed in his dissenting opinions in *Bartkus* and *Abbate*. *Waller*, 397 U.S. at 395 (Black, J., concurring).

[8] Under the Court's doctrine of territorial incorporation, residents of unincorporated territories lack the complete array of constitutional rights otherwise enjoyed by residents of incorporated territories, and the Court has continued to classify Puerto Rico as an unincorporated territory. *Shell*, 302 U.S. at 257-58 (citing *Balzac v. Puerto Rico*, 258 U.S. 298, 304-05 (1922), and noting that the Court had held that Puerto Rico "is not a territory within the reach of the Sixth and Seventh

(Continued on following page)

for purposes of falling under the territorial section (§ 3) of the 1890 Sherman Act. 302 U.S. at 256-57.[9]

Significantly, the Court in *Shell* acknowledged that Congress had passed several laws to give Puerto Rico "an autonomy similar to that of the states and incorporated territories." 302 U.S. at 262. Included among "[t]his comprehensive grant of legislative power made by Congress," was the "responsibility of searching out local offenses and prosecuting them in local tribunals." *Id.* Congress did so to "confer upon the territory many of the attributes of quasi sovereignty possessed by the states," and *"[b]y those acts . . . '[a] body politic' – a commonwealth – was created."* *Id.* (quoting 48 U.S.C. § 733) (emphasis added). The *Shell* opinion rejected outright the argument that local Puerto Rico prosecutions presented a danger of successive federal and territorial criminal prosecutions because the courts "whether exercising federal or local jurisdiction, are creations emanating from the same sovereignty." *Id.* at 264. "Prosecution under one of the laws in the appropriate court, necessarily, will

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Amendments"); *see also* Pet. App. 40a (citing this Court's reaffirmation of doctrine); *Boumediene v. Bush*, 553 U.S. 723, 757-58 (2008); *Torres v. Puerto Rico*, 442 U.S. 465, 470 (1979).

[9] The Court reached this conclusion in part by construing the legislative intent of the Sherman Act drafters as co-extensive with their power under the Territories Clause, *Shell*, 302 U.S. at 259, and in part by construing their intent to make the statutory status of Puerto Rico under the Sherman Act be derivative of its constitutional status as a territory.

bar a prosecution under the other law in another court." *Id.* (citing *Grafton*, 206 U.S. 333).[10]

Even though these comprehensive prior Congressional enactments had already transformed Puerto Rico into a "commonwealth" by 1937, capable of prosecuting local crime, *Shell* held that Puerto Rico was, for constitutional purposes, still a territory of the United States, because Puerto Rico was a "creation[ ] emanating from the same sovereignty" – the federal government. 302 U.S. at 264.[11] Accordingly, *Shell* held that the Congressionally-conferred status of Puerto Rico as a "commonwealth" does not alter its constitutional status as a territory under the Constitution.[12] Hence, further Congressional enactments in

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[10] The Court would later, in a footnote in *Waller*, describe the *Shell* opinion's approval of *Grafton* as "dicta." 397 U.S. at 393 n.5. But *Waller* nonetheless affirmatively held that *Grafton*'s territorial sovereignty ruling "controls" the double jeopardy question placed before it – whether municipalities are the same sovereign as their corresponding state in the same manner as territories are the same sovereign as the federal government – which presupposes that *Grafton* controls the territory of Puerto Rico.

[11] In 1972, this Court re-affirmed, and extended, the *Shell* antitrust holding to the unincorporated territory of American Samoa. *United States v. Standard Oil Co. of Cal.*, 404 U.S. 558, 559-60 (1972).

[12] As Justice Thomas noted in his concurrence in *Lara*, because "the Territories are the United States for double jeopardy purposes . . . the degree of autonomy of Puerto Rico is beside the point." *United States v. Lara*, 541 U.S. 193, 226 (2004) (Thomas, J., concurring) (citing *Wheeler*, 435 U.S. at 321-22; *Shell*, 302 U.S. at 264-66). Further, as correctly noted by the

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the early 1950s expanding the autonomy of Puerto Rico's territorial government did not *transform* Puerto Rico into a "commonwealth" – it already was one.

The journey from (non-sovereign) territory to (sovereign) State is a well-established path that has been followed by the majority of States since the beginning of the Republic pursuant to Article IV, § 3, cl. 1 of the Constitution. Its *sine qua non* is an act of Congress. As the Puerto Rico Supreme Court accurately observed below, Congress has not embarked upon the preliminary steps for such a path by Puerto Rico. Pet. App. 50a. Congress has considered, but not yet passed, legislation to make Puerto Rico a State. *See, e.g.*, H.R. 727, "Puerto Rico Statehood Procedure Act," 114th Cong. (March 16, 2015).

After *Shell*, this Court has consistently held that Puerto Rico is a "territory" for constitutional purposes. *See, e.g.*, *Harris v. Rosario*, 446 U.S. 651, 651-52 (1980) (per curiam); *Califano v. Torres*, 435 U.S. 1 (1978). Moreover, this Court has done so for the purpose of upholding the constitutional authority of Congress under the Territory Clause to accord different or inferior legislative treatment for Puerto Rico's residents. *Harris*, 446 U.S. at 651-52.

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opinion below, Puerto Rico lacks the original or prior sovereignty over its affairs enjoyed by Indian Tribes, as it was subject to the Spanish monarchy prior to becoming a United States territory. Pet. App. 66a (citing Justice Thomas' *Lara* concurrence).

For its part, Congress has taken no legislative step since 1898 to alter Puerto Rico's status from that of a territory to a state under Article IV, § 3, cl. 1 of the Constitution. To the contrary, Congress has continued to enact legislation that treats Puerto Rico differently than the States, including the disparate treatment accorded Puerto Rico in the Bankruptcy Code which is the subject of two pending cases in this Court. *Franklin California Tax-Free Trust v. Puerto Rico*, 805 F.3d 322, 344-45 (1st Cir. 2015) (Puerto Rico "is 'constitutionally a territory,' because Puerto Rico's powers are not '[those] reserved to the States' but those specifically granted to it by Congress under its constitution. *See* U.S. Const. art. IV, § 3, cl. 2; . . . *Harris*, 446 U.S. 651"), *cert. granted*, 2015 WL 5005197 (Dec. 4, 2015).

To the extent that Petitioner perceives that Puerto Rico has experienced a transformation from territory to sovereign, it apparently went unnoticed by the court in the best position to perceive such a change: the Puerto Rico Supreme Court. After conducting a comprehensive analysis of the Federal Relations Act, the Puerto Rico Constitution, and the history of uniform treatment of Puerto Rico as a territory by the federal Executive, Legislative, and Judicial Branches over the last century, that court concluded:

> [T]he approval of a constitution for Puerto Rico did not represent a change in the basis of its relationship with the United States and, therefore, Puerto Rico continues to be a

> territory subject to the territorial clause of the Constitution of the United States. The legislative history of Public Law 600 and its subsequent interpretation by the U.S. Supreme Court so reveal. It is also thusly interpreted by the federal Executive Branch. In short, there is unanimity among the three branches regarding this matter.

Pet. App. 61a-62a.

Insofar as that holding constitutes an interpretation of Puerto Rican law by the highest court of Puerto Rico, it is subject to the "rigid rule of deference" owed that Court. *Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 339 n.6 (1986); *Sancho v. Texas Co.*, 308 U.S. 463, 471 (1940) (rejecting "mere lip service" to this rule). Interpretations of the Puerto Rico Constitution by its highest court are worthy of such deference, as is the considered conclusion of that court regarding the Puerto Rican sovereignty that document secures. Because Puerto Rico is a necessary participant in its own liberation, the view of its highest court on the matter is entitled to deference.

Petitioner fails to identify any other example in our Nation's history where the sovereignty of a non-State was created – or even recognized – by Congress or the Constitution. *Compare Wheeler*, 435 U.S. at 321 ("[A] territorial government is entirely the creation of Congress, 'and its judicial tribunals exert all their powers by authority of the United States.'") (quoting *Grafton*, 206 U.S. at 354). Other than

through the formal mechanism of admission to statehood set forth in U.S. Const. art. IV, § 3, cl. 1, there is no constitutional or other authority for Congress to authorize a territory to become a sovereign or *de facto* state.

Had Congress chosen to travel the untrod path of granting sovereignty to any territory without formally admitting it as a State, it would need to speak clearly, and Congress has not done so here. Indeed, this Court would be the ultimate arbiter of the constitutionality of Congress conferring such *de facto* statehood status upon a territory, including whether Congress even has the authority to delegate sovereignty to a territory, incorporated or not.

There are multiple independent constitutional reasons why Puerto Rico is neither a State nor a *de facto* State: First, Puerto Rico's unambiguous constitutional status is that of a territory and not a State.[13] Second, Puerto Rico is not a *de facto* State because this Court has rejected such a *de facto* statehood status, which also would be inconsistent with the history of Puerto Rico's relations with the United

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[13] *See Igartua v. United States*, 626 F.3d 592, 595 (1st Cir. 2010) ("[T]he constitutional text is entirely unambiguous as to what constitutes statehood; the Constitution explicitly recites the thirteen original states as being the states and articulates a clear mechanism for the admission of other states, as distinct from territories. Puerto Rico does not meet these criteria.").

States.[14] Third, Article III does not empower federal courts to declare Puerto Rico a State.[15] Finally, the separation of powers doctrine dictates that only Congress can make Puerto Rico a State, and in the absence of Congressional action, the separation of powers doctrine – which an accused has standing to invoke, *see Bond v. United States*, 131 S. Ct. 2355, 2365 (2011) – prevents the Executive and Judicial Branches from usurping this unique constitutional prerogative.[16]

As recently as 2012, the Solicitor General represented to this Court:

> [N]either this Court nor the court of appeals has concluded that Puerto Rico is a State under the Constitution. . . . The Framers did not anticipate that the federal courts would decide, under any rubric of de facto or

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[14] This Court's precedent has been interpreted by both the First Circuit and the Supreme Court of Puerto Rico as "plainly reject[ing] the 'de facto' approach." *Igartua*, 626 F.3d at 601 (citing *Adams v. Clinton*, 90 F. Supp. 2d 35 (D.D.C. 2000) (per curiam), *aff'd*, 531 U.S. 941 (2000); *Hepburn & Dundas v. Elzey*, 6 U.S. 445 (1805) (Marshall, J.)); *accord* Pet. App. 57a-59a.

[15] *Igartua*, 626 F.3d at 599 ("No constitutional text vests the power to amend or the power to create a new state in the federal courts. No such power is granted to the courts by Article III, which creates and limits the jurisdiction of the federal courts.").

[16] *Igartua-De La Rosa v. United States*, 417 F.3d 145, 148 (2005) ("The path to changing the Constitution lies . . . through the constitutional amending process, U.S. Const. art. V; and the road to statehood – if that is what Puerto Rico's citizens want – runs through Congress. U.S. Const. art. IV, § 3, cl. 1.").

> functional statehood, whether a particular territory should be entitled to claim the privileges of membership in the Union. *The Constitution commits that quintessentially political question to Congress.*

Igartua v. United States, Case No. 11-876, Solicitor General Brief, at 16 (emphasis added).[17]

Rather than entangle this Court in a political question, risk usurping constitutional powers uniquely assigned to Congress, or limn the borders of this Court's Article III powers, the more prudent course would be to preserve the double jeopardy rights that this Court has recognized since 1907, and not extend a judicial exception to double jeopardy whose continued vitality has been long criticized by many respected jurists.

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[17] *See also* Report by the President's Task Force on Puerto Rico's Status (2007), at 5-6 ("The Commonwealth system does not, however, describe a *legal* status different from Puerto Rico's constitutional status as a 'territory' subject to Congress's plenary authority under the Territory Clause. . . . [T]he Department of Justice concluded in 1959 that Puerto Rico remained a territory, and as noted above, the Supreme Court, while recognizing that Puerto Rico exercises substantial political autonomy under the current commonwealth system, has held that Puerto Rico remains fully subject to congressional authority under the Territory clause. *See Harris*, 446 U.S. at 651.") (emphasis in original), *available at* http://goo.gl/NYl83n.

CONCLUSION

Petitioner asks this Court to recognize the sovereignty of Puerto Rico in order to deprive Respondents of the double jeopardy protections that the Court has previously recognized for Puerto Rico residents since 1907. Absent clear authorization from Congress, however, this Court cannot recognize Puerto Rico as an independent sovereign.

What the Court can do is reexamine the continuing viability of the judicially-created dual sovereignty doctrine. And what it should do is abandon it.

The judgment of the Puerto Rico Supreme Court should be affirmed.

Respectfully submitted,

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No. 15-108

IN THE

Supreme Court of the United States

THE COMMONWEALTH OF PUERTO RICO,

Petitioner,

v.

LUIS M. SÁNCHEZ VALLE AND
JAIME GÓMEZ VÁZQUEZ,

Respondents.

On Writ of Certiorari to the Supreme Court of Puerto Rico

BRIEF FOR *AMICI CURIAE* PROFESSORS CHRISTINA DUFFY PONSA AND SAM ERMAN IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICI CURIAE*[1]

Amici curiae are scholars of the law and history of U.S. territories, U.S. sovereignty, and the place of Puerto Rico in the U.S. constitutional scheme. *Amici* have a professional interest in the doctrinal and historical issues involved in this Court's interpretation of the meaning of separate sovereignty for purposes of the Double Jeopardy Clause and the Constitution more broadly. Moreover, *amici* have a professional interest in historical conceptions of sovereignty and a general interest in the status and sovereignty of Puerto Rico.

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[1] The parties have consented to the filing of this brief. No party to this case or their counsel authored this brief in whole or in part, and no person other than *amici* and their counsel paid for or made a monetary contribution toward the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The creation of the Constitution and Commonwealth of Puerto Rico in 1950-1952 was a tremendous political achievement. No prior U.S. territory had known such extensive autonomy. *See* José Trías Monge, *Puerto Rico: The Trials of the Oldest Colony in the World* 119 (1997). But that achievement does not mean that Puerto Rico became a separate sovereign. The history of territorial governance in the United States shows a clear distinction between autonomy and sovereignty: it is not only possible, but common, to have one without the other. Diverse forms of political autonomy have always existed in the U.S. territories. Like municipalities and the District of Columbia, U.S. territories are not subnational separate sovereigns within the United States. Yet, all these entities constitutionally can and do enjoy broad and varied powers. *See Avery v. Midland County, Tex.*, 390 U.S. 474, 481 (1968); *District of Columbia Home Rule Act*, Pub. L. No. 93–198, 87 Stat. 774 (1973); Arnold H. Leibowitz, *Defining Status: A Comprehensive Analysis of U.S. Territorial Relations* pt. II (1989). Conversely, American Indian tribes have been continuous sovereigns since the Founding, but nonetheless have endured periods of losses of self-government, territory, autonomy, police powers, legitimacy, and even life at the hands of the federal government. *See generally* Francis Paul Prucha, *The Great Father* (1986). Separate sovereignty is neither necessary nor sufficient to make the events of 1950-52 consequential.

The Commonwealth of Puerto Rico has not undergone the transformation from territory to State that is required for separate *sovereignty* in our

federal system. Although the Constitution permits many divisions of power within the United States, it provides but a single means of erecting separate sovereigns: "New States may be admitted by the Congress into this Union." U.S. Const. art. IV, § 3, cl. 3. Throughout the nineteenth century, it was conventional wisdom and practice that all U.S. territories would become sovereigns within the United States only by admission into statehood. Even the Insular Cases and their progeny, which envisioned U.S. territories that might one day leave the United States rather than transition to statehood, *see* Christina Duffy Burnett [Ponsa], Untied *States: American Expansion and Territorial Deannexation*, 72 U. Chi. L. Rev. 797 (2005), did not suggest that such territories could become separate sovereigns within the United States outside the framework of the Admission Clause.

The parties agree that before 1952, Puerto Rico was a U.S. territory, lacked separate sovereignty, and was subject to Congress's "plenary power" under the Territory Clause. This case raises the question of whether the events of 1950-52 made Puerto Rico a new sovereign in the constitutional system. History illuminates the answer to that question. *First*, the historical experience of territories that subsequently became states demonstrates that a territory does not become sovereign merely by adopting a constitution. Instead, it was admission into statehood rather than ratification of a constitution that marked the transition into separate sovereignty. Indeed, Congress consistently treated approval of territorial constitutions and admission into statehood as two distinct acts to be accomplished through separate statutory language. *Second*, Congress repeatedly extended to the territories extensive autonomy

without thereby transforming those territories into sovereigns. Prior to the events of 1950-1952, neither the adoption of a territorial constitution, whether alone or with congressional approval, nor the extension of autonomy to a territory, had ever transformed a territory into a separate sovereign within the U.S. constitutional system. For those events nonetheless to have transformed Puerto Rico into a separate sovereign, therefore, would have been both historically and constitutionally unprecedented.

Chief Justice Liana Fiol Matta of the Puerto Rico Supreme Court has equated recognizing Puerto Rican separate sovereignty with acknowledging that "the drafting and ratification of our Constitution by the People of Puerto Rico was not a marginal and insignificant event." *People of Puerto Rico v. Sánchez Valle*, P.R. Offic. Trans., slip op. at 131a (Mar. 20, 2015) (Fiol Matta, C.J., concurring). Separate sovereignty, however, is a sign of legal status, not a measure of political meaning. The significance of the events of 1950-1952 lies in their unprecedented enhancement of Puerto Rico's autonomy, not their implicit creation of a novel form of sovereignty.

ARGUMENT

I. IN TERRITORIES THAT BECAME STATES, IT WAS ADMISSION TO STATEHOOD, RATHER THAN CREATION OF A CONSTITUTION, THAT BROUGHT SEPARATE SOVEREIGNTY.

Nineteenth-century territorial history strongly suggests that constitutional self-proclamation does not a sovereign make. The U.S. territories were active sites of constitution-making throughout the nineteenth century. Residents revealed an almost

universal desire to achieve statehood eventually, be it to lock up local political power free from federal oversight, gain access to federal assistance and protection, or achieve the dignity that came with elevation to the rank of separate sovereign. *See generally The Uniting States: The Story of Statehood for the Fifty United States* vols. 1-3 (Benjamin F. Shearer ed., 2004). Had territories been able to achieve separate sovereignty through constitution-making, U.S. territorial history would look different indeed. Instead, culturally and geographically diverse territories proceeded on the implicit understanding that only admission into statehood could change their sovereign status. *See generally ibid.*

The consensus historical understanding of how to achieve separate sovereignty is at odds with arguments that Puerto Rico became a separate sovereign in 1952 by virtue of Puerto Rico's Constitution *alone*. According to Petitioner's account, transforming territories into separate sovereigns is simply what constitutions do, through their own declarative force: "[T]he people of Puerto Rico engaged in an exercise of popular sovereignty in 1952 by adopting their *own* Constitution establishing their *own* government to enact their *own* laws. The Commonwealth of Puerto Rico is a creature of the people of Puerto Rico, not of Congress." Pet. Br. at 1–2. On this view, it is the adoption and ratification of a constitution, not any congressional action, that creates a separate sovereign.

But under similar circumstances, U.S. territories and the federal government have repeatedly recognized that it is admission to statehood, not creation of a constitution, that marks the culmination

of the process of achieving separate sovereignty. Both have treated adoption of a territorial constitution as a mere way station. Specifically, as discussed below, a number of nineteenth-century U.S. territories engaged in repeated episodes of constitution-making. Their efforts shared some or all of the features that Petitioner cites as evidence that Puerto Rico achieved separate sovereignty in 1950-1952. Pet. Br. at 29–30. These features include: constitutional conventions; foundational texts deploying the language of popular sovereignty and establishing governments of, by, and for the people; and ratification by popular vote. *Ibid.* Yet far from leading to separate sovereignty outside of statehood, some of these territorial constitutions simply led back to the drawing board. When that occurred, the territory remained a territory—even after adopting a constitution, sometimes even after the constitution had been ratified by popular vote, and always after the constitution invoked the venerable and time-tested language of popular sovereignty.

To be sure, every territory annexed prior to 1898 eventually gained admission into statehood and concomitant separate sovereignty after adopting a constitution that would become the state constitution. *See generally Uniting States*, *supra*, vols. 1–3. But the historical record suggests that neither Congress nor the territories ever understood a territorial constitution as an end in itself: the end was always statehood, and the separate sovereignty that only statehood could confer. The examples below illustrate the general point.

Consider Arizona. It held its first constitutional convention in 1891—over two decades before its admission into statehood in 1912 (at which time a

second constitution, adopted and ratified in 1911, became the state constitution). *Uniting States*, *supra*, vol. 1 at 88-97 The delegates to Arizona's 1891 constitutional convention drafted a text that invoked the language of popular sovereignty: "*We, the People* of Arizona... in order to form a more *independent* government *do ordain and establish* the Constitution of the State of Arizona." *Constitution for the State of Arizona, as Adopted by the Constitutional Convention, Friday, October 2d, 1891, and Address to the People of the Territory* 7 (1891) (emphases added). The 1891 Arizona constitution established a government consisting of three separate branches, set forth a bill of rights, and provided amendment procedures. *Id.* at 7–28. And in December 1891, the people of Arizona ratified their constitution by popular vote. *Uniting States*, *supra*, vol. 1 at 88. Statehood did not ensue for another twenty-one years. In the interim, it was congressional supremacy as usual. *See* Max Farrand, *The Legislation of Congress for the Government of the Organized Territories of the United States, 1789-1895* 92 (1896) (listing congressional legislation for the territories, expressly including Arizona, after 1891, in Appendix B). The separate sovereignty that Arizona sought remained to be won.

In Colorado, it took six constitutions to get to statehood. Three were adopted, and two ratified by popular vote, before Congress even passed the organic act forming the Territory of Colorado in 1861. *See* Daniel A. Oesterle & Richard B. Collins, *The Colorado State Constitution: A Reference Guide* 2–6 (2002); *Colorado Organic Act*, ch. 59, 212 Stat. 172 (1861). Yet the organic act contained no sign that Congress intended to strip the people of the territory of any constitutionally achieved separate sovereignty.

Separate sovereignty had to wait until Colorado's admission into statehood in 1876. *See Uniting States*, *supra*, vol. 1 at 186.

New Mexico's first constitution, adopted in 1850 and ratified by an overwhelming majority of the vote, began with the language of popular sovereignty as well: "*We, the People* of New Mexico do *ordain and establish* the following Constitution and do mutually agree with each other to form ourselves into a *free and independent* State." *Constitution of the State of New Mexico, 1850*, at 13 (1965) (emphases added). Yet the 1850 constitution did not lead to statehood. Instead, in its wake, Congress passed an organic act creating a government for the Territory of New Mexico. *See* Chuck Smith, *The New Mexico State Constitution: A Reference Guide* 4 (1996); *An Act to establish a territorial Government for New Mexico*, ch. 49, 9 Stat. 446 (1850). Once again, the act contained no sign that Congress believed it was stripping the people of New Mexico of any separate sovereignty they had achieved through a constitution. New Mexico continued to seek the separate sovereignty of statehood, which it secured in 1912, more than six decades later. Smith, *supra*, at 13.

South Dakota saw its share of pre-statehood constitutional activity as well, including three constitutional conventions and at least one constitution that did not ultimately become the state constitution. *See Uniting States*, *supra*, vol. 3 at 1113–22. Like Arizona's 1891 constitution, South Dakota's 1883 constitution was adopted and popularly ratified, but then discarded. *Id.* at 1116. Its lengthy preamble of course invoked popular sovereignty: "*We, the People* of South Dakota in order to form a more perfect and *independent*

Government *do ordain and establish* this constitution for the State of South Dakota." *South Dakota Constitution of 1883, Printed in Dakota Constitutional Convention, Held at Sioux Falls, September 1885* vol. I at 9 (1907) (emphases added). Admittedly, this constitution was the product of a constitutional convention held in defiance of the wishes of the territorial governor. That said, arguably this defiance constituted an even more robust exercise of popular sovereignty at the local level, insofar as the territorial governor was a federally appointed official. Moreover, residents of South Dakota expressly claimed that in the absence of congressional action, they could achieve separate sovereignty via self-proclamation by declaring themselves a state; yet as a leading historian of the effort reports, "[n]ot many legal scholars, politicians, and impartial observers outside the territory were much impressed by the reasoning involved." *Uniting States*, *supra*, vol. 3 at 1114. When statehood advocates from South Dakota presented the 1883 Constitution to the U.S. Congress later that year, the Senate took it seriously enough to vote in favor of statehood, though the House declined to follow suit. Patrick M. Garry and Candice Spurlin, *History of the 1889 South Dakota Constitution*, 59 S.D. L. Rev. 14, 29 (2014); S. Rep. No. 15, at 4 (1st Sess. 1886) (describing the adoption and ratification of the 1883 Constitution). Rebuffed, South Dakota went on to hold its 1885 and 1889 constitutional conventions, adopt a second constitution, and finally gain separate sovereignty as a state in 1889. *See Uniting States*, *supra*, at 1121.

In Utah, it took seven constitutions over a period of nearly fifty years to get to statehood. These began with the Constitution of the State of Deseret in 1849

and ended with the Constitution of the State of Utah in 1896. *See* Jean Bickmore White, *The Utah State Constitution: A Reference Guide* 2–3 (2002); *see also* Peter Crawley, *The Constitution of the State Deseret*, 29:4 BYU Studies 7, 13–14 (1989). Although the Constitution of Deseret was adopted by the Mormon Council of Fifty rather than by constitutional convention, it nonetheless served as the organic law of the self-denominated "State of Deseret" for a year—until Congress adopted an organic act for the Territory of Utah. *An Act to Establish a Territorial Government for Utah*, ch. 51, 9 Stat. 453 (1850). During that year, the Constitution of Deseret provided a structure of government, qualifications for voting and holding public office, and rights of citizens. *See* White, *supra*, at 2–3. Indeed, both before and after the adoption of the Constitution of the State of Deseret, the Council exercised full local self-government powers: it "drafted laws, levied taxes, apportioned land to settlers, issued water and timber rights, located a cemetery, and imposed fines and punishments for criminal offenses." Crawley, *supra*, at 8. It may well be that some Utah residents wished they were "sovereign" in various ways, but as a federal constitutional matter, there is no question that the United States exercised sole sovereignty over this territory upon its annexation in the Treaty of Guadalupe Hidalgo. *See* Treaty of Peace, Friendship, Limits and Settlement between the United States of America and the Mexican Republic, Mex.-U.S., May 30, 1848, 9 Stat. 922. Congress acted accordingly: the federal act remained Utah's organic law even as another five constitutions were adopted by constitutional convention in the years 1856, 1862, 1872, 1882, and 1887 *See* White, *supra*, at 3–8; Farrand, *supra*, at 74–93 (listing congressional acts

between 1850 and 1894 affecting the territories, including Utah, in Appendix B). These repeated efforts to achieve statehood finally succeeded in 1896, after Utah adopted its seventh constitution. *See Uniting States*, *supra*, vol. 3 at 1190–1211.

As these episodes of territorial constitution-making suggest, nineteenth-century territorial constitutions aimed to persuade Congress into admitting territories into statehood. It was a territory's admission into statehood, not its adoption of a constitution, that culminated in its separate sovereignty.

II. CONGRESS HAS CONSISTENTLY DISTINGUISHED BETWEEN ITS DELEGATION OF EXTENSIVE AUTONOMY TO TERRITORIES AND ITS ADMISSION OF TERRITORIES INTO STATEHOOD.

For those who argue that Puerto Rico became a separate sovereign in 1952, the alternative to resting on the Puerto Rico Constitution alone is to argue that Congress conferred separate sovereignty on Puerto Rico. *See, e.g.*, Pet. Br. at 8–9, 31–32. This argument requires that Congress possessed both the constitutional power to transform Puerto Rico into a separate sovereign and the intent to do so. As noted above, there are good textual, doctrinal, and historical reasons to think that Congress lacks this power. Congress historically has erected separate sovereigns by admitting territories into statehood, the only method the Constitution expressly provides. Any creation of a non-state separate sovereign within

the United States would be a revolution in the practice and doctrine of U.S. sovereignty.[2]

There are also good reasons to infer that Congress did not intend to transform Puerto Rico into a separate sovereign. No federal law expressly purports to confer U.S. sovereignty on Puerto Rico. Proponents of this view nonetheless argue that Congress conferred U.S. sovereignty by implication. As evidence, they cite Congress's decisions to treat Puerto Rico in a manner similar to other territories that achieved separate sovereignty, and to grant Puerto Rico unprecedented autonomy. *See, e.g.*, Pet. Br. at 30–39, 44. But history shows that these factors are not sufficient to create sovereignty.

A. Congress's Approval of the Puerto Rico Constitution Is Not Analogous to the Admission of Territories into Sovereign Statehood

One version of the argument that Congress transformed Puerto Rico into a separate sovereign in

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[2] The only separate sovereigns within the United States other than States are the American Indian tribes, which prior to the creation of the United States held a sovereignty that they have continually retained ever since. *See United States v. Lara*, 541 U.S. 193, 199 (2004); *United States v. Wheeler*, 435 U.S. 313, 322–23, 326–29 (1978), *superseded by statute on other grounds as recognized in United States v. Lara*, 541 U.S. 193 (2004). As Petitioner recognizes, Pet. Br. at 5, Puerto Rico can claim no such continuous, preexisting sovereignty. Spanish sovereignty over Puerto Rico was transferred in full to the United States via the Treaty of Paris in 1899. *See* Treaty of Peace between the United States of America and the Kingdom of Spain, Spain-U.S., Apr. 11, 1899, 30 Stat. 1754, 1755 ("Article II. Spain cedes to the United States the island of Porto Rico ").

1950-1952 proceeds by analogy to the three-step process whereby twenty-one prior U.S. territories became States. *See, e.g.*, Pet. Br. at 32–33. In those territories, Congress passed an "enabling act" authorizing the adoption of a local constitution; the territory then adopted a constitution pursuant to this congressional authorization; and Congress subsequently passed an "admission act" approving the constitution and admitting the territory into statehood. Once a territory becomes a state, it unquestionably becomes a separate sovereign. Similarly, in Puerto Rico, Congress passed a statute authorizing the adoption of a local constitution; Puerto Rico then adopted a constitution pursuant to this authorization; and Congress subsequently passed a statute approving the constitution of the Commonwealth of Puerto Rico. *See, e.g.*, Pet. Br. at 8–9.

But the analogy is fatally inexact. True enough, prior territories and Puerto Rico adopted constitutions that Congress had authorized and later approved. But before any territory became a state, Congress always took the further step of formal admission. Crucially, Congress consistently distinguished between its approval of a proposed state constitution and its admission of the territory into statehood. The Admission Acts for Louisiana (in the early nineteenth century) and Idaho (in the late nineteenth century) provide representative examples:

> Whereas the representatives of the people [of Louisiana] did form for themselves a constitution and state government, And the said constitution having been transmitted to Congress, and by them being hereby approved; therefore

> *Be it enacted.* , That the said state shall be one, and is hereby declared to be one of the United States of America, and admitted into the Union on an equal footing with the original states in all respects whatever.

An Act for the Admission of the State of Louisiana into the Union, and to extend the laws of the United States to the said State, ch. 50, 2 Stat. 701 (1812).

> *Be it enacted.* , That the state of Idaho is hereby declared to be a state of the United States of America, and is hereby declared admitted into the union on an equal footing with the original states in all respects whatever; and that the constitution which the people of Idaho have formed for themselves be, and the same is hereby, accepted, ratified and confirmed.

An Act to provide for the admission of the State of Idaho into the Union, ch. 656, 26 Stat. 215 (1890); *cf.* Pet. Br. at Appendix B (quoting "approval" language but omitting "admission" language for Arkansas, California, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Minnesota, Mississippi, Oregon, Wisconsin, and Wyoming).

The distinction between admission to statehood and constitutional approval tracks the text of Section 3 of Article IV of the U.S. Constitution. Clause 3 specifically confers upon Congress the power to admit a State. Otherwise, Congress proceeds under its plenary Clause 2 power to govern territories. On a number of occasions, Congress approved a proposed state constitution even as it imposed conditions on an entering State; the territory—still a territory—

then had to comply with those congressional conditions before its subsequent admission. As these examples make clear, until it formally admits a territory into statehood, Congress is exercising its plenary Clause 2 power over territories. *Cf. Coyle v. Smith*, 221 U.S. 559, 579–80 (1911) (holding that a State, once admitted, may refuse to comply with certain congressionally imposed conditions on its admission, due to its having become a separate sovereign on an equal footing with other States). Meanwhile, every time Congress admitted a State, it was exercising its specific Clause 3 power. If Petitioner's analogy holds, Congress was exercising its plenary Clause 2 power to govern territories when it approved Puerto Rico's Constitution. Puerto Rico remained one crucial step shy of achieving the separate sovereignty that previous territories had attained only when Congress exercised its specific Clause 3 power: the power to admit a State.

B. Congress's Grant of Extensive Autonomy to Territories Was Not a Congressional Grant of Sovereignty

The other version of the argument that Congress extended Puerto Rico separate sovereignty rests on the extensive autonomy that Puerto Rico enjoys. *See, e.g.*, Pet. Br. at 29–31. Surely Congress would not permit a non-sovereign such self-direction. *Ibid.* Yet, Congress has throughout history repeatedly done just that.

Congress has long extended non-sovereign territories extensive powers to choose their leaders and make their laws, albeit while retaining and sometimes exercising plenary power over those territories. *See generally* Jack Ericson Eblen, *The*

First and Second United States Empires: Governors and Territorial Government, 1784-1912 (1968); John Welling Smurr, Territorial Constitutions: A Legal History of the Frontier Governments Erected By Congress in the American West, 1790-1900 (1960) (Ph.D. dissertation, Indiana University).[3] While it periodically exercised its "Power to make all needful Rules and Regulations for the Territories of the United States," U.S. Const. art. IV, § 3, cl. 2, from early on, Congress mostly left the territories alone to govern themselves. *See* Eblen, *supra*, at 301–02; *see also id.* at 323 (listing compilations of laws enacted by territorial legislatures); Farrand, *supra*, at 57–93 (listing congressional acts affecting the territories in Appendix B). This Court has long and consistently confirmed both that Congress wields plenary power to govern the territories, *see American Ins. Co. v. 356 Bales of Cotton*, 26 U.S. 511, 546 (1828); *United States v. Gratiot*, 39 U.S. 526, 537 (1840); *First Nat'l Bank v. Yankton*, 101 U.S. 129, 133 (1879); *Harris v. Rosario*, 446 U.S. 651, 651–52 (1980) (per curiam); *see generally* Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 U. Texas L. Rev. 1, 163–250 (2002), and that the territories enjoy something akin to a qualified form of sovereignty, *see Cowell v. Colorado Springs Co.*, 100 U.S. 55, 59–60 (1879); *De Geofroy v. Riggs*, 133 U.S. 258, 268–69 (1890); *Davis v. Beason*, 133 U.S. 333,

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[3] The precise extent of Congress's power over territories was the subject of debate, of course, due to divisions over slavery. *See generally* Don E. Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics* ch. 6–7 (1978).

345–46 (1890), *abrogated in part on other grounds by Romer v. Evans*, 517 U.S. 620, 634 (1996); *Puerto Rico v. Shell Co.*, 302 U.S. 253, 260–62 (1937); *Rodríguez v. Popular Democratic Party*, 457 U.S. 1, 8 (1982); *see generally* Smurr, *supra*, at 430–60.

Indeed, as one study of local territorial government has explained, the territories always exercised state-like "police powers." Smurr, *supra*, at 941; *see also id.* at 941–46. Although they had federally appointed governors, their legislatures were elected, and these elected bodies enacted territorial laws, including criminal laws, which were enforced in the name of the People of the territory. *See* Eblen, *supra*, at ch. 5; Smurr, *supra*, at 941–46. Territories were treated as states for certain purposes. *See, e.g.*, *De Geofroy*, 133 U.S. at 269 (while discussing "the organized municipalities known as 'territories' and the 'District of Columbia,'" noting two prior decisions by the Court "that the District of Columbia, being a separate political community, is in a certain sense a state"); Smurr, *supra*, at 430–60. They were sometimes even described as wielding certain powers associated with "sovereignty," although when the odd nineteenth-century territorial court mistook a territory's colloquial sovereignty for the formal separate sovereignty needed to qualify for the dual sovereign exception to the Double Jeopardy Clause, this Court identified the error. *See Shell*, 302 U.S. at 267–68 (describing *In re Murphy*, 40 P 398 (Wyo. 1895), and similar decisions as "erroneous"); Resp. Br. at 9 n.1; *cf.* Pet. Br. at 23-24.

But no degree of territorial self-government stripped Congress of its plenary power over the territories. As this Court confirmed in *First National Bank v. Yankton*, when the Court was describing

Congress's power to amend the acts of the territorial legislature:

> Such a power is an incident of sovereignty, and continues until granted away. Congress may not only abrogate laws of the territorial legislatures, but it may itself legislate directly for the local government. It may make a void act of the territorial legislature valid, and a valid act void.

101 U.S. at 133.

Throughout the nineteenth and twentieth centuries, territorial non-sovereignty and territorial autonomy simply co-existed. *First*, this Court recognized the distinction between autonomy and sovereignty in *De Geofroy*, 133 U.S. 258, an 1890 case concerning whether the phrase "states of the Union" in a treaty encompassed the District of Columbia. Answering in the affirmative, the Court began by describing "those political communities exercising various attributes of sovereignty which compose the United States, as distinguished from the organized municipalities known as 'territories' and the 'District of Columbia.'" *Id.* at 268. Yet, it continued, lack of sovereignty did not mean lack of self-government. It explained that

> separate communities, with an independent local government, are often described as 'states,' though the extent of their political sovereignty be limited by relations to a more general government, or to other countries. The term is used in general jurisprudence, and by writers on public law, as denoting organized political societies with an established government.

Ibid. Since the District of Columbia fit the latter description despite its lack of separate sovereignty, the treaty encompassed it. *Id.* at 272.

Second, congressional and territorial practices in the nineteenth century support the same conclusion. The territories had extensive self-government, *see* Eblen, *supra*, at 301 ("As territorial home rule developed, the federal government increasingly limited itself to general supervision and left strictly internal affairs to the territorial governments, except when their action constituted an extreme misuse of power or threatened some vital national policy."), but that was not equivalent to sovereignty. The experiences of California and Indiana dramatically illustrate the phenomenon. Each of these territories not only adopted and ratified a constitution before the territory's admission into statehood, but put it into effect immediately, forming a government under it and electing a governor and legislature, all of whom took office before the territory's admission into statehood. *See* Joseph R. Grodin, Calvin R. Massey, and Richard B. Cunningham, *The California State Constitution: A Reference Guide* 8–9 (1993); William P McLauchlan, *The Indiana State Constitution: A Reference Guide* 4 (1996); James H. Madison, *The Indiana Way: A State History* 54 (1986); *cf.* Pet. Br. at 7 Yet Congress's admission act for California included the usual conditions on statehood, *see An Act for the Admission of the State of California into the Union*, ch. 50, § 3, 9 Stat. 452 (1850), while the formulaic language of Indiana's gave no sign that Congress believed the territory had attained an intermediate stage of separate sovereignty prior to its admission, *see Resolution for Admitting the State of Indiana into the Union*, 3 Stat. 399 (1816). It was admission into statehood, not territorial autonomy,

that brought separate sovereignty to California and Indiana.

Third, in the twentieth century, this Court reaffirmed the compatibility of territorial autonomy and non-sovereignty in a case specifically concerning Puerto Rico: *Shell*, 302 U.S. 253. *Shell* was decided fifteen years *before* Puerto Rico became a "Commonwealth," and therefore during the period in which no one disputes Puerto Rico was a territory. The Court was explicit that Puerto Rico both enjoyed extensive self-government and was not then a separate sovereign. It explained:

> [T]he theory upon which [the] territories have been organized "has ever been that of leaving to the inhabitants all the powers of self-government consistent with the supremacy and supervision of National authority, and with certain fundamental principles established by Congress" "The powers thus exercised by the Territorial legislatures are nearly as extensive as those exercised by any State legislature."

Id. at 260 (quoting *Clinton v. Englebrecht*, 80 U.S. 434, 441 (1871); *Hornbuckle v. Toombs*, 85 U.S. 648, 655 (1873)). Accordingly, in Puerto Rico's case, "[t]he aim of [the organic acts] was to give Puerto Rico full power of local self-determination, with an autonomy similar to that of the states and incorporated territories." *Shell*, 302 U.S. at 261-62. "The effect was to confer upon the territory many of the attributes of quasi sovereignty possessed by the states," and "so far as local matters are concerned , legislative powers nearly, if not quite, as extensive as those exercised by the state legislatures." *Id.* at 262. This "comprehensive grant

of legislative power made by Congress plainly recognizes the great desirability of devolving upon [Puerto Rico's] local government the responsibility of searching out local offenses and prosecuting them in the local tribunals." *Id.* at 262. These offenses, the Court noted, were even at that time prosecuted in the name of the "The People of Puerto Rico," a fact entirely consistent with Puerto Rico's status as a territory. *Ibid.*

The Court acknowledged that successive prosecutions under the local law and the Sherman Antitrust Act would violate the prohibition against double jeopardy. "Both the territorial and federal laws and the courts, whether exercising federal or local jurisdiction, are creations emanating from the same sovereignty." *Id.* at 264. Even so, absent an "actual conflict," a territory had a distinct and independent interest in creating and prosecuting offenses under local law. *Id.* at 270–71. For this reason, it could enact and prosecute offenses that overlapped with federal law, so long as the defendants had not already been prosecuted for the same offense. *Id.* at 266–70.

In short, remarkably high levels of autonomy have always coexisted with ultimate federal sovereignty in the U.S. territories. In 1950-1952, Congress acted on this understanding when it sought to authorize in Puerto Rico the greatest possible degree of self-government it could allow in a territory, short of admitting it into statehood. To do so, Congress had no need to establish Puerto Rico as a separate sovereign.

Contrary to the First Circuit's suggestion, to acknowledge that Congress retained full federal sovereignty over Puerto Rico when it followed

longstanding historical practice by allowing Puerto Rico to achieve robustly autonomous self-government is *not* "to impute to the Congress the perpetration of a monumental hoax." *Figueroa v. Puerto Rico*, 232 F.2d 615, 620 (1st Cir. 1956) (quoted in Pet. Br. at 2). Rather, it is to recognize that Congress accomplished a momentous transformation of Puerto Rico's political autonomy within the U.S. constitutional framework.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Puerto Rico should be affirmed.

Respectfully submitted,

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December 22, 2015

No. 15-108

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In the Supreme Court of the United States

COMMONWEALTH OF PUERTO RICO,
Petitioner,

–v–

LUIS M. SÁNCHEZ VALLE and
JAIME GÓMEZ VÁZQUEZ,
Respondents.

On Writ of Certiorari to the Supreme Court of Puerto Rico

BRIEF OF AMICUS CURIAE VIRGIN ISLANDS BAR ASSOCIATION (VIBA) IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

Whether the Commonwealth of Puerto Rico and the Federal Government are separate sovereigns for purposes of the Double Jeopardy Clause of the United States Constitution.

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STATEMENT OF INTEREST[1]

The Virgin Islands Bar Association ("VIBA") as *amicus curiae* respectfully submits this brief in support of the Respondents. The VIBA is an integrated bar association with approximately 1000 members practicing within the territory of the United States Virgin Islands.[2] The Virgin Islands is located in the Lesser Antilles of the Caribbean and consists primarily of the islands of St. Croix, St. John, St. Thomas, and Water Island, along with numerous lesser cays.

The VIBA, along with the Supreme Court of the Virgin Islands, governs the practice of law there and brings together attorneys of all levels of experience in all fields of practice. The mission of the VIBA is to promote advancements and improvements in the administration of justice and access to justice, to improve and remain connected to its community

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. All parties have filed with this Court blanket consents to the filing of *amicus curiae* briefs in support of either party or neither party. *See* Docket in *Commonwealth of Puerto Rico v. Sanchez Valle, et al.*, No. 15-108 (U.S. Oct. 19, 2015 & Oct. 20, 2015).

[2] Neither this brief nor the decision to file it should be construed to reflect the view of any individual member of the VIBA. Moreover, some of the members of the VIBA are judges. No judicial members participated in the adoption or endorsement of the positions in this brief, nor was it circulated to any judicial member before filing.

through public education and public service outreach, and to monitor and advocate for any public policy issues affecting the judicial system, its servants, and their clients. These goals are accurately reflected in its motto: "Striving for Justice Serving our Community."

This case touches upon several areas relevant to these vital goals. The practice of law in the Virgin Islands, as well as the structure of the judicial system itself, has developed and advanced in large part based on and because of its status as a Territory, and not a State. Active VIBA members regularly represent indigent criminal defendants in the Virgin Islands on both a compulsory and voluntary basis, and are therefore intimately familiar with the current interplay between local and federal criminal laws in the Territory. *See Barnard v. Thorstenn*, 489 U.S. 546, 557 (1989); *In re Holcombe*, S. Ct. Civ. No. 2015-0007, __V.I.__, 2015 WL 7576037 (V.I. Nov. 25, 2015). In this capacity, VIBA members must routinely consider whether, and to what extent, portions of the United States Constitution apply to the Virgin Islands.

Based upon these strong interests in the stability and vitality of the practice and enforcement of law in the Virgin Islands, the VIBA urges this Court to either dismiss this matter for lack of appellate jurisdiction, or affirm the judgment of the Supreme Court of Puerto Rico and hold that the Commonwealth of Puerto Rico and the federal government are not separate sovereigns for purposes of the Double Jeopardy Clause of the United States Constitution.

SUMMARY OF ARGUMENT

The first matter before this Court is that of appellate jurisdiction; that is, whether this Court has appellate jurisdiction to hear the Petitioner's interlocutory appeal from the dismissal of a single count of a multi-count indictment[3] based on double jeopardy where the other counts, unaffected by the dismissal, are currently pending. It does not.

The second matter before this Court concerns the question presented on the merits. It raises issues that could have a tremendous effect not only on the legal relationship between the United States and the Territory of the Virgin Islands but also on the rights and privileges of Virgin Islanders in their everyday lives. The critical, if not dispositive, point to consider is that the laws and courts of the Virgin Islands owe their existence to the same authority as do those of the federal government: the United States. The same holds true for the Commonwealth of Puerto Rico. It may have adopted its own constitution in 1952, but not without (1) the grant of authority to do so by Congress, (2) the imposition of certain requirements in that constitution by Congress, and (3) the approval of said constitution by Congress. *Figueroa v. People of Puerto Rico*, 232 F.2d 615, 620 (1st Cir. 1956). Puerto

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[3] The record reflects that the Petitioner filed three single-count Complaints, or indictments, against each Respondent, but that each set of three was effectively consolidated and treated as one, as each was part and parcel of the same proceeding against each respective Respondent. JA7-10.

Rico has never received the equal status that is provided to the true dual sovereigns in our federalist system of government: the fifty states, and the various Native American tribes. That Puerto Rico has adopted an illusory constitution that Congress may amend or overrule at any time does not make it a separate sovereign for the purposes of the Double Jeopardy Clause of the United States Constitution; the fact that Congress may transfer or cede Puerto Rico, as has been done with other territories in the past—including the Commonwealth of the Philippines—itself demonstrates that it cannot be a sovereign.

Should this Court recognize Puerto Rico as a separate sovereign, it will be imposing on its people a burden of Statehood without the accompanying rights and privileges to which actual citizens of States are entitled. Those who reside in Puerto Rico, the Virgin Islands, and other territories face many extraordinary challenges. Territories have no voting voice in the federal government that oversees so many aspects of their lives. They receive no electoral votes for President. No territory has representation in the United States Senate, and each receives only one non-voting delegate in the House of Representatives.

Several courts have held that those born in the territories are citizens only by operation of statute, and not the United States Constitution, *see, e.g.*, *Tuaua v. United States*, 788 F.3d 300, 307-08 & n.7 (D.C. Cir. 2015), while another has held that individuals leaving the territories for one of the fifty states may undergo a full search of their person and belongings even "in the absence of any degree of suspicion that the individual is engaged in wrongdoing." *United States*

v. Hyde, 37 F.3d 116, 118 (3d Cir. 1994). But because of the single-sovereign doctrine, the right to be free from double jeopardy is one of the very rare instances where residents of America's territories receive greater protection than those afforded to residents of the fifty states: an individual acquitted of a crime in federal court is protected from further harassment by the territorial government (and vice versa) with respect to the same act.

Notwithstanding the Petitioner's representations to the contrary, the decision in this case will necessarily extend to the Territory of the Virgin Islands, where its people are subject to the same federal legislative oversight as their counterparts in Puerto Rico, and where the same principle of single-sovereignty has been accepted by both the Supreme Court of the Virgin Islands and the United States Court of Appeals for the Third Circuit. *Rivera-Moreno v. Gov't of the V.I.*, 61 V.I. 279, 305 (V.I. 2014); *Gov't of the V.I. v. Brathwaite*, 782 F.2d 399, 406 (3d Cir. 1986). The existence of a constitution in Puerto Rico does not change the fact that it was only created with the legislative permission and approval of Congress; although the Virgin Islands has not adopted its own constitution in the Virgin Islands, it has undergone a similar process through which the fundamental provisions of its governing Organic Act were proposed by the people or their elected representatives and ultimately approved by Congress.

The reach of this Court's decision, should it address the question presented on the merits, extends beyond the borders of Puerto Rico and further than the four corners of the Puerto Rico Constitution. It includes, at

the very least, the Virgin Islands, by virtue of its identical territorial status. If this Court should recognize Puerto Rico as a separate sovereign for double jeopardy purposes—in the process providing the citizens of Puerto Rico with fewer rights than they are presently entitled—but continue to deny the direct applicability of other constitutional provisions, it will set dangerous precedent illustrative of the kind of inconsistent application that could render parts of the Constitution meaningless. After all, what good is a constitutional right that is not constitutionally applied? The VIBA suggests that if this Court feels inclined to recognize Puerto Rico as a dual sovereign for the purposes of the Double Jeopardy Clause, then it should also consider whether the provision of representation and voting rights equivalent to those received by citizens of States is the better option for Puerto Rico, and therefore the Virgin Islands, and its citizens.

The VIBA, on behalf of its members, their clients and their prospective clients, urges this Court to affirm the judgment of the Puerto Rico Supreme Court in dismissing the relevant charges against the Respondents as barred by the Double Jeopardy Clause of the United States Constitution.

ARGUMENT

I. THIS COURT LACKS APPELLATE JURISDICTION TO HEAR THE PETITIONER'S INTERLOCUTORY APPEAL

The Petitioner claims that this Court has jurisdiction over this appeal under 28 U.S.C. § 1258, which provides that

> Final judgments or decrees rendered by the Supreme Court of the Commonwealth of Puerto Rico may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or whether the validity of a statute of the Commonwealth of Puerto Rico is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Id. (emphasis added). Because the decision rendered by the Puerto Rico Supreme Court is not a final judgment, this Court should dismiss this case for lack of subject matter jurisdiction.[4]

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[4] "The objection that a federal court lacks subject-matter jurisdiction may be raised by a party, or by a court on its own initiative, at any stage in the litigation." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 506-07 (2006).

The relevant facts are fairly straightforward. The Respondents were charged at the territorial level with violating several sections of the Puerto Rico Weapons Act, including P.R. Laws Ann. tit. 25, § 458, which bars the sale of weapons and ammunition without a license, as well as P.R. Laws Ann. tit. 25, §§ 458c, 458f, 458i. (Pet.App.10a). In federal court, however, the Respondents were only prosecuted for illegally selling weapons and ammunition without a license, in violation of 18 U.S.C. § 922(a)(1)(A)–an offense that subsumes the lesser included offense of that in § 458 of the Puerto Rico Weapons Act. (Pet.App.10a). The Respondents were not prosecuted at the federal level for offenses similar to or including any of the other separate and different charges pending in territorial court. (Pet.App.10a).

After both Respondents were separately convicted and sentenced to the charges in federal court, they each filed a motion to dismiss the entire case against them, claiming that the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution protected them from being prosecuted in Puerto Rico. The trial court, over the government's objection in each case, granted the motions to dismiss, ruling that the sovereignty of Puerto Rico to criminally prosecute its citizens resided and emanated from the federal government through Congress. (Pet.App.3a, 6a). It therefore concluded that the charges filed against the Respondents violated their constitutional protection against double jeopardy provided by the United States Constitution and the Puerto Rico Constitution, dismissing the entirety of both indictments. (Pet.App.3a, 6a). The government appealed and, after consolidating both cases, the Court of Appeals

reversed the trial court's rulings, holding that the Respondents could be submitted to criminal prosecution both in federal court and in territorial court in Puerto Rico for the same criminal behavior without violating the constitutional safeguard against double jeopardy. (Pet.App.6a).

The Puerto Rico Supreme Court then partially reversed the decision of the Puerto Rico Court of Appeals. In its decision, the Supreme Court ordered dismissal of only the count in each indictment related to § 458 of the Puerto Rico Weapons Act. (Pet.App.69a). Notably, the remaining counts in the indictments were untouched by the Supreme Court's decision and therefore, once reinstated by the Court of Appeals, they remain pending after the Supreme Court's decision. The government then petitioned for writ of certiorari, which this Court granted.

The record thus reflects that the constitutional question in this case is limited to a single count in each of the multi-count indictments against the Respondents. Because the Supreme Court's decision affected some but not all of the counts against the Respondents, it was not a final judgment. The question then arises as to whether the Petitioner's interlocutory appeal is permissible under some exception to the final-judgment rule or whether, to the contrary, this Court is without jurisdiction to hear it. Because the Court's judgment fits no exception to the final judgment rule, this Court has no appellate jurisdiction over this matter and should dismiss the Petitioner's appeal.

It is well established that there exists in criminal cases "a firm congressional policy against interlocutory or 'piecemeal' appeals and courts have consistently given effect to that policy." *Abney v. United States*, 431 U.S. 651, 656 (1977). Finality of judgment is generally required "as a predicate for federal appellate jurisdiction." *Id.* "Adherence to this rule of finality has been particularly stringent in criminal prosecutions because 'the delays and disruptions attendant upon intermediate appeal,' which the rule is designed to avoid, 'are especially inimical to the effective and fair administration of the criminal law.'" *Id.* at 657 (quoting *DiBella v. United States*, 369 U.S. 121, 126 (1962)); *see also United States v. MacDonald*, 435 U.S. 850, 853-54 (1978) ("[t]he rule of finality has particular force in criminal prosecutions because encouragement of delay is fatal to the vindication of the criminal law" [internal quotation marks omitted]). "The importance of the final judgment rule has led the Court to permit departures from the rule only when observance of it would practically defeat the right to any review at all." *Flanagan v. United States*, 465 U.S. 259, 265 (1984) (internal quotation marks omitted). The right of appeal in criminal cases "is purely a creature of statute"; *Abney*, 431 U.S. at 656; and, consistent with that principle, a party must satisfy the terms of the applicable statute–in this case, 28 U.S.C. § 1258–in order to exercise that statutory right in the present case.

This Court previously has addressed pretrial orders regarding a motion to dismiss an indictment on the ground of double jeopardy, but only insofar as (1) the defendant moved to dismiss an entire one-count

indictment, (2) the pretrial orders denied that motion to dismiss, and (3) the defendant sought to appeal immediately rather than at the close of trial. In *Abney*, this Court held that otherwise interlocutory pretrial orders in such cases fall within the "collateral order" exception to the final-judgment rule articulated in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), and thus constitute an immediately appealable final judgment.[5] *Abney*, 431 U.S. at 659.

The *Abney* Court analyzed a pretrial denial of a motion to dismiss an indictment on double jeopardy grounds in accordance with these three factors and ultimately concluded that the denial of a motion to dismiss an indictment based on double jeopardy grounds is an immediately appealable final judgment. *Id.* It emphasized that the protection against double jeopardy, if denied at first, "would be significantly undermined if appellate review were postponed until after conviction and sentence." *Id.* at 660. The Court explained that the right that the Double Jeopardy Clause protects is the right not to be "twice put to trial for the same offense," and the protections of the Clause

> would be lost if the accused were forced to "run the gauntlet" a second time before an appeal could be taken; even if the accused is

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[5] The Court in *Cohen* recognized that an otherwise interlocutory order qualifies as an effectively "final" one when it (1) fully and finally decides (2) a separate question collateral to the merits of the underlying proceeding, and (3) the decision involves an important right and must be appealed immediately or else the right will be "lost, probably irreparably" if appellate review is deferred to the end of the case. 337 U.S. at 546-47.

> acquitted, or, if convicted, has his conviction ultimately reversed on double jeopardy grounds, he has still been forced to endure a trial that the Double Jeopardy Clause was designed to prohibit.

Id. at 661-62. "Consequently, if a criminal defendant is to avoid exposure to double jeopardy and thereby enjoy the full protection of the Clause, his double jeopardy challenge to the indictment must be reviewable before that subsequent exposure occurs." *Id.* at 662.

This Court has not subsequently addressed whether the rule in *Abney* extends to an appeal by the government from the granting of a motion to dismiss a single count of a multi-count indictment. As a practical matter, this may be because 18 U.S.C. § 3731 permits the United States to appeal from an order "dismissing an indictment or information as to any one or more counts." But by its own terms, this statute only applies to proceedings in federal district courts in which the United States is a party; it cannot authorize an appeal by a territorial government from a non-final decision of a territorial supreme court. *United States v. Burroughs*, 289 U.S. 159, 163-64 (1933) (held that predecessor to 18 U.S.C. § 3731 did not permit appeal from District of Columbia local court system to United States Supreme Court); *Guam v. Okada*, 715 F.2d 1347 (9th Cir. 1982) ("We find nothing in the language of section 3731 or its legislative history to indicate an intent to authorize an appeal in a criminal case by a territorial government.").

Several federal Courts of Appeal, however, have considered whether the reasoning from *Abney* should extend to an appeal taken by the defendant from the

denial of a motion to dismiss a single count of a multi-count indictment. *Compare United States v. Witten*, 965 F.2d 774, 776 (9th Cir. 1992) ("*Abney* does not provide a basis for finding jurisdiction here. The appellants moved to dismiss an alleged predicate act, not an entire indictment, or even an entire count. Even if the alleged predicate act were dismissed, the appellants would still face trial "); *United States v. Tom*, 787 F.2d 65, 68 (2d Cir. 1986) (held that *Abney* does not apply to permit an interlocutory appeal from District Court's order refusing to dismiss a portion of one count in a multi-count indictment because defendant would be tried on the remainder of the count anyway; dismissed for lack of appellate jurisdiction); *with, United States v. Ginyard*, 511 F.3d 203, 208 (D.C. Cir. 2008) (applied *Abney* and found appellate jurisdiction, holding that a defendant may not be put to trial twice on a single count of an indictment just as he may not be put to trial twice on an entire indictment under Double Jeopardy Clause); *see also United States v. Marino*, 200 F.3d 6, 11-12 (1st Cir. 1999) (found no appellate jurisdiction to review defendant's appeal from denial of motion *in limine* to exclude evidence as to a certain count because even if motion was granted a retrial on that count would still have been necessary and postponement of the appeal would not have "irretrievably deprive[d]" defendant of any double jeopardy protection).

As these cases illustrate, "in the context of a double jeopardy claim, an interlocutory appeal is available under the collateral order doctrine only where the asserted right would be 'lost, probably irreparably,' if review had to await final judgment.'" *Tom*, 787 F.2d at 68 (quoting *Abney*, 431 U.S. at 658)

(internal quotation marks omitted). Where a motion to dismiss a single count of a multi-count indictment is denied in its entirety, and but for the opportunity to appeal the denial immediately, the defendant will lose his double jeopardy protections, such an immediate appeal is permissible. Where, however, a motion to dismiss a portion of a count in a multi-count indictment is denied (or even granted) and the defendant would have to face trial on the challenged count anyway, the order is not immediately appealable and must be deferred to the end of the case. What follows is that a defendant is not entitled to take an interlocutory appeal from a pretrial order concerning a motion to dismiss a count on which trial will in any event occur; in other words, he cannot immediately appeal an order on a count when waiting until the end of the case to appeal it will not deprive him of any double jeopardy rights. The same holds true with even greater force with respect to an interlocutory appeal by the government, since the United States Constitution confers rights on criminal defendants, and not the prosecution. *United States v. Thoms*, 684 F.3d 893, 902-03 (9th Cir. 2012); *Rivera-Moreno v. Gov't of the V.I.*, 61 V.I. 279, 321 (V.I. 2014).

Finally, in addition to *Abney* and the collateral order doctrine from *Cohen*, this Court has applied the rule set forth in *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975), to limited circumstances in the criminal context involving appeals taken from state court judgments rendered before the conclusion of all proceedings in state court under 28 U.S.C. § 1257 *See, e.g., Florida v. Thomas*, 532 U.S. 774, 777-81 (2001) (dismissing writ of certiorari for want of jurisdiction after applying *Cox*). In *Cox*, the Court

construed § 1257, which authorizes the Court's review of final judgments rendered by the highest court of a state, to treat those judgments as final in cases where (1) there are further proceedings yet to occur but where the federal issue is conclusive or the outcome of further proceedings preordained; (2) the federal issue will survive and require decision regardless of the outcome of the future state-court proceedings; (3) the federal claim has been finally decided and later review of the federal issue cannot be had, whatever the outcome of the case; or (4) the state court has conclusively decided a federal issue but the party seeking review might prevail on the merits on nonfederal grounds. *Cox*, 420 U.S. at 479-83.

First, arguably, *Cox* does not apply, as a judgment rendered in the Puerto Rico Supreme Court is not a state court judgment under § 1257.[6] *See, e.g., Fornaris v. Ridge Tool Co.*, 400 U.S. 41, 42 n.1 (1970). Moreover, even if *Cox* does apply, only the first three categories are relevant to the present matter, and the Petitioner's interlocutory appeal does not fall into any of them. Because the Puerto Rico Supreme Court left untouched the judgment of the Puerto Rico Court of Appeals reinstating the charges arising under Sections 458c, 458f and 458i of the Puerto Rico Weapons Act, its conclusion that the counts brought under Section 458 are barred by double jeopardy does not conclusively end the litigation or render the

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[6] Section 1257(b) expressly includes the District of Columbia Court of Appeals as within the term "highest court of a State," but omits mention of the Puerto Rico Supreme Court. This makes sense, as jurisdiction over appeals from the Puerto Rico Supreme Court is governed by 28 U.S.C. § 1258.

outcome preordained.[7] *Jefferson v. City of Tarrant*, 522 U.S. 75, 83 (1997) ("Far from terminating the litigation, the court answered a single certified question that affected only two of the four counts in Petitioners' complaint."). Nor will the federal issue necessarily survive regardless of the outcome of the case; if the Respondents are ultimately acquitted on the remaining charges—Sections 458c (illegally carrying a firearm), 458f (illegally carrying a rifle), and 458i (transferring a mutilated weapon) charges—then collateral estoppel would likely prevent a prosecution under Section 458 (illegally selling and transferring a firearm), since the jury would have necessarily found that the Respondents never possessed a firearm. *Ashe v. Swenson*, 397 U.S. 436, 443 (1970). And this is not a case in which later review of the double jeopardy issue can never be had regardless of the outcome of the case; if the Respondents are ultimately convicted on the remaining charges, Puerto Rico could still appeal the dismissal of the Section 458 counts, since the dismissal was "on a basis unrelated to factual guilt or

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[7] Moreover, as this Court implied in *Jefferson*, the Puerto Rico Supreme Court may, as part of future appellate proceedings in this case, choose to overturn or reexamine its double jeopardy decision. 522 U.S. at 83. In fact, the decision in this case itself overturned a prior precedent of that court. And as the respondents noted in their opposition to certiorari, the United States Court of Appeals for the First Circuit is currently considering similar issues in other cases, the disposition of which may cause the Puerto Rico Supreme Court to reconsider its own decision.

innocence."[8] *United States v. Scott*, 437 U.S. 82, 99 (1978).

In sum, the Petitioner's interlocutory appeal fails to fit into either the collateral order exception to the final judgment rule articulated in *Cohen* and applied in *Abney* or the factors listed in *Cox* for state court judgments under § 1257 It is premature and therefore should be dismissed for lack of jurisdiction.

II. THE COMMONWEALTH OF PUERTO RICO AND THE FEDERAL GOVERNMENT ARE NOT SEPARATE SOVEREIGNS

The Petitioner offers, as the essence of this case, the question of whether Puerto Rico law emanates from a different source of authority than federal law. (Pet.Br.1). The answer, the Petitioner resoundingly states, is yes:

> Puerto Rico law emanates from authority delegated by the people of Puerto Rico, who engaged in an exercise of popular sovereignty in 1952 by adopting their own Constitution establishing their own government to enact

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[8] The fact that there is a situation in which Puerto Rico could appeal the decision after entry of final judgment distinguishes this case from *Kansas v. Marsh*, 548 U.S. 163 (2006), where the nature of the state supreme court's decision—holding the state death penalty statute unconstitutional while simultaneously requiring a new trial on the underlying offense—truly prevented the prosecution from obtaining review at a future date under any circumstances, given the prohibition on the prosecution appealing a jury's acquittal, *see Ball v. United States*, 163 U.S. 662, 671 (1896), or the prosecution seeking capital punishment after a lesser sentence has already been imposed, *see Arizona v. Rumsey*, 467 U.S. 203, 212 (1984).

> their own laws. The Commonwealth of Puerto Rico is a creature of the people of Puerto Rico, not of Congress. That point resolves this case.

(Pet.Br.1-2, emphasis in original). For support, the Petitioner points to the people of Puerto Rico's adoption of their own Constitution, which it proclaims "is a democratic manifestation of the will of the people of Puerto Rico." (Pet.Br.2). Since Congress's 1952 approval and ratification of the Puerto Rico Constitution (after conditioning that approval on certain minor changes), the Petitioner characterizes Puerto Rico's status as something between a state and a territory—a sovereign territory, so to say—whose laws emanate from the people of Puerto Rico and not the federal government. (Pet.Br.17-18).

In order to make this argument, the Petitioner exalts its own constitution over the organic acts of Congress that permit self-governance by the other territories, including the Virgin Islands (and the Virgin Islands Revised Organic Act of 1954). In so doing, the Petitioner elevates form over substance. The essential flaw in the Petitioner's argument is that the characteristics it derives from the Puerto Rico Constitution upon which it relies to demonstrate Puerto Rico's dual sovereignty apply equally to the United States Virgin Islands and the Virgin Islands Revised Organic Act of 1954, which the Petitioner classifies as a single-sovereign territory.[9] (Pet.Br.28)

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[9] The Petitioner cites to 48 U.S.C. § 1704 for the proposition that a federal statute provides that the Virgin Islands, Guam, and American Samoa and the federal government are a single sovereign for federal double jeopardy purposes. (Pet.Br.39 n.4). This proposition is both incomplete and inaccurate. Section 1704

(proposition that Puerto Rico law emanates from different source than federal law "may not have been true prior to the adoption of the Puerto Rico Constitution in 1952, insofar as the Puerto Rico legislature at that time exercised authority delegated by Congress through organic acts"); (Pet.Br.38 n.4) (District of Columbia, Guam, the Virgin Islands, and American Samoa all self-governed pursuant to organic acts of Congress; lower courts have held that these territories and the federal government are a single sovereign for federal double jeopardy purposes).

> Specifically, the Petitioner notes that in light of the Puerto Rico Constitution, the Commonwealth now elects its Governor and legislature; appoints its judges, all cabinet officials, and lesser officials in ——the executive branch; sets its own educational

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states that the Virgin Islands, Guam, and American Samoa "shall have concurrent civil and criminal jurisdiction with the United States with regard to property owned, reserved, or controlled by the United States in the Virgin Islands, Guam, and American Samoa respectively." § 1704(a) (emphasis added). Section 1704 is limited to dual prosecutions related to United States property. *See, e.g.*, *Water Isle Hotel & Beach Club, Ltd. v. Kon Tiki St. Thomas, Inc.*, 795 F.2d 325, 328 (3d Cir. 1986) ("The legislative grant to the Virgin Islands was broadened further in 1982 when the United States conveyed certain submerged and filled lands to the Virgin Islands government. 48 U.S.C. §§ 1701-1708."). Moreover, other statutes contain similar language as § 1704 with respect to the fifty states, indicating that Congress, in promulgating such laws, was not intending to establish a policy on double jeopardy. *See, e.g.*, 18 U.S.C. § 2117 ("A judgment of conviction or acquittal on the merits under the laws of any State shall be a bar to any prosecution. "); 18 U.S.C. § 660 (same); 15 U.S.C. § 80a-36 (same); 49 U.S.C. § 80501(b).

> policies; determines its own budget; and amends its own civil and criminal code.

(Pet.Br.37), quoting *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 671 (1974); *see also Examining Bd. of Engineers, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 594 (1976) (same). The Petitioner continues: "Since 1952, the Federal Government has told the people of Puerto Rico and the world that the people of Puerto Rico democratically adopted and approved their own Constitution. That Constitution, which Congress reviewed and approved, establishes a government of the people, by the people, and for the people of Puerto Rico." (Pet.Br.37-38) (citation omitted). Puerto Rico's Constitution, therefore, in the eyes of the Petitioner, distinguishes it from the other territories and is key in making it a uniquely separate sovereign.

Like Puerto Rico, however, the Virgin Islands has achieved all of these milestones, and has done so with the express approval of the Virgin Islands people–even without a constitution. Just last Term, this Court recognized direct lawmaking, in the form of initiative and referendum, as a means for the people to exercise popular sovereignty. *Arizona State Legislature v. Arizona Independent Redistricting Comm'n*, __U.S.__, 135 S.Ct. 2652, 2659-60, 2671 (2015). These forms of direct democracy have a long history in the Virgin Islands. While Puerto Rico opted to delegate drafting of a formal constitution to an elected constitutional convention, the people of the Virgin Islands have instead used the initiative and referendum procedure to alter the relationship between the Virgin Islands and the United States.

On August 17, 1916, the Virgin Islands—then known as the Danish West Indies—held a referendum on the sale of the islands to the United States, which passed with a vote of 4,727 in favor and only seven against. N.Y. TIMES, Aug. 18, 1916, p. 1, col. 5. For approximately 20 years after the transfer from Denmark to the United States, the Virgin Islands operated under a temporary government consisting of two popularly-elected local legislatures—one for St. Croix, the other for St. Thomas and St. John—and a Governor appointed by the President of the United States.

When Congress considered establishing a permanent government for the Virgin Islands, U.S. Senator Millard E. Tydings, the Chair of the Senate Committee on Territories and Insular Possessions, rejected a draft organic act prepared by the Presidentially-appointed governor, and instead demanded that another bill be drafted "which would meet with approval of the local people." U.S. House of Representatives, Committee on Insular Affairs, Hearings on H.R. 11751 to Provide a Civil Government for the Virgin Islands of the United States, 74th Cong., 2d sess. (1936), p.1. In response, the two democratically-elected Virgin Islands legislatures drafted a bill, which, with some minor changes, eventually became the Virgin Islands Organic Act of 1936. William W. Boyer, *America's Virgin Islands: A History of Human Rights and Wrongs 185-86* (2d ed. 2010).

In 1953, the Virgin Islands held a referendum on several questions, including whether to combine the two legislatures into a single legislature and to elect a

governor and a resident commissioner to Congress, which provided an impetus for Congress to replace the Organic Act of 1936 with the Revised Organic Act of 1954. BOYER 234. Although only the combined legislature was included in the original version of the Revised Organic Act, Congress subsequently amended the Revised Organic Act to provide for a democratically-elected Governor and Lieutenant Governor, *see* Pub. L. 90-496, 73 Stat. 569 (1968), and Delegate to Congress, *see* Pub. L. 92-270, 86 Stat. 118 (1972). Those amendments also abolished the Presidential veto of territorial legislation. *See* Pub. L. 90-496, 82 Stat. 837 (1968). Congress also included provisions in the Revised Organic Act allowing the Virgin Islands Legislature the discretion—which it subsequently exercised—to expand the jurisdiction of the local court system, including establishing the insular appellate court that would become the Supreme Court of the Virgin Islands. Pub. L. 98-454, 98 Stat. 1732 (1984).

Like Puerto Rico at the time of the *Flores de Otero* decision, the Virgin Islands exercises "the degree of autonomy and independence normally associated with States of the Union." The Virgin Islands elects its own Governor, Lieutenant Governor, Delegate to Congress, and members of the Legislature. The Governor appoints all lesser executive branch officials. Justices of the Virgin Islands Supreme Court and judges of the Virgin Islands Superior Court are nominated by the Governor with the advice and consent of the Legislature. The Virgin Islands sets its own budget, and amends its own civil and criminal codes pursuant to the same democratic process employed in the 50 States. While these reforms did not

occur through a constitutional convention, the history of the Virgin Islands makes it clear that these reforms were initiated either directly through the people or their democratically-elected representatives. And although Congress had to ultimately acquiesce, the same is true of the Puerto Rico Constitution, which required congressional approval before becoming operative. Thus, the Petitioner's acknowledgement of federal legislative oversight of the Virgin Islands is interesting, where Congress made the same delegations and has the same oversight in Puerto Rico, but through a constitution rather than a body of statutes.[10]

The significance of these similarities is twofold: first, as noted briefly above, the characteristics upon which the Petitioner relies to set Puerto Rico apart from the other territories in support of separate sovereignty do not accomplish that purpose; if anything, they accomplish the opposite. Second, they reflect that this Court's decision in the present matter will have critical import not only to Puerto Rico but also to the other United States territories–including, at the very

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[10] The Petitioner maintains that Congress may not unilaterally repeal or alter the Puerto Rico Constitution or its "compact" with Puerto Rico. However, as the Petitioner acknowledges, "[i]n 1976, the Northern Mariana Islands and the United States," like Puerto Rico, "entered into a Covenant to establish a Commonwealth and the people of the Northern Mariana Islands thereafter adopted their own Constitution." (Pet.Br.38 n.4). What the Petitioner fails to note is that Congress has unilaterally amended its Covenant with the Northern Mariana Islands, most recently when it passed Public Law 110-229, 122 *Stat.* 754 (2008), which eliminated that territory's ability to administer its own immigration system.

least, the Virgin Islands. If this Court decides that Puerto Rico is a separate sovereign for the purposes of the Double Jeopardy Clause, that decision arguably could be extended to the Virgin Islands and its citizens.

The VIBA's concerns with the extension of this decision to the Virgin Islands mirror its issue with the position that the Petitioner has taken in this appeal: it saddles the territories with the burdens that go along with being a state but awards them none of the benefits. This is where Puerto Rico and the Virgin Islands share additional similarities, though somewhat less glamorous. Neither territory has representation in the United States Senate and each has only one non-voting delegate in the House of Representatives. Neither territory is entitled to electoral votes for President.[11] *See* U.S. CONST. ART. II, § 1, cl. 2 (providing for appointment of electors by "Each State"). Some federal Courts of Appeal have held that birth in a United States territory does not constitute birth "in the United States" under the Citizenship Clause of the United States Constitution and thus does not constitutionally give rise to United

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11 This is in contrast to Indian tribes, whose members have the right to vote in presidential, congressional, state and local, and tribal elections. *See* 8 U.S.C. § 1401 (granting American Indians citizenship) *and* U.S. CONST. AMEND. XV (providing that citizens of United States shall have right to vote). The Petitioner's analogy of Puerto Rico to Indian tribes falls short, as American Indians have many of the rights that Puerto Rico and Virgin Islands citizens do not, including the very basic right to vote for President.

States citizenship.[12] *See, e.g.*, *Nolos v. Holder*, 611 F.3d 279, 283-84 (5th Cir. 2010) "([i]t is incorrect to extend citizenship to persons living in United States territories simply because the territories are 'subject to the jurisdiction' or 'within the dominion' of the United States, because those persons are not born 'in the United States' within the meaning of the Fourteenth Amendment"); *Lacap v. INS*, 138 F.3d 518, 518-19 (3d Cir. 1998) (same); *Valmonte v. INS*, 136 F.3d 914, 915-21 (2d Cir. 1998) (same); *Rabang v. INS*, 35 F.3d 1449, 1450-54 (9th Cir. 1994) (same); *see also Tuaua*, 788 F.3d at 307-08 & n.7 ("This Court, like the lower court, is [also] mindful of the years of past practice in which territorial citizenship has been treated as a statutory, and not a constitutional right."). This Court has even observed, without deciding, that individuals born in the Philippines at the time that the Philippines were a territory of the United States were not United States citizens. *See Rabang v. Boyd*, 353 U.S. 427, 430-31 (1957) ("The inhabitants of the Islands acquired by the United States during the late war with Spain, not being citizens of the United States, do not possess right of

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[12] Of course, Congress can extend, and has extended, the statutory right to citizenship by birth to various United States territories. *See* 8 U.S.C. § 1402 (Puerto Rico); 8 U.S.C. § 1406 (the Virgin Islands); 8 U.S.C. § 1407 (Guam). What one Congress has given, however, can be taken away by a subsequent Congress. *See Reichelderfer v. Quinn*, 287 U.S. 315, 318 (1932) ("[T]he will of a particular Congress does not impose itself upon those to follow in succeeding years."); *see also Abdul-Akbar v. McKelvie*, 239 F.3d 307, 316 (3d Cir. 2001) ("What Congress gives it may also take away.").

free entry into the United States." (citation and quotation marks omitted)).

Finally, the Tenth Amendment, which provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people," does not apply to either Puerto Rico or the Virgin Islands. *Franklin California Tax-Free Trust v. Puerto Rico*, 805 F.3d 322, 344-45 (1st Cir. 2015), *cert. granted*, No. 15-233 (U.S. Dec. 4, 2015) ("[t]he limits of the Tenth Amendment do not apply to Puerto Rico, which is 'constitutionally a territory,' because Puerto Rico's powers are not '[those] reserved to the States' but those specifically granted to it by Congress under its constitution") (emphasis in original; citation omitted); 48 U.S.C. § 1561 ("The following provisions of and amendments to the Constitution of the United States are hereby extended to the Virgin Islands to the extent that they have not been previously extended to that territory and shall have the same force and effect there as in the United States or in any State of the United States the first to ninth amendments inclusive. ").

The VIBA also takes issue with the Petitioner's position because it strips the territories of one of the benefits of their current status as a territory: single sovereignty with the federal government for the purposes of double jeopardy. When the Petitioner advocates for awarding its citizens with the protections of the Double Jeopardy Clause, it ignores that double jeopardy protections already apply. What dual sovereignty in accordance with the Petitioner's claim will actually accomplish is the creation of a second

avenue for the prosecution of the territory's citizens for an offense where only one such avenue previously existed. *See, e.g.*, *Commonwealth v. Mills*, 286 A.2d 638, 641 (Pa. 1971) ("We are talking about the two governments protecting their interests, when we really should be talking about the individual, since by focusing on the individual we see that it matters little where he is confined–in a federal or state prison–the fact is that his liberty is taken away twice for the same offense."). Thus, while Puerto Rico and Virgin Island citizens cannot vote for President, have a voting voice in Congress, or have a constitutional right to citizenship by birth, they will now be subject to being put to trial twice for an offense stemming from the same conduct, once by the federal government and once by the territorial government.[13]

In sum, this Court's decision on the question presented will have a long-standing effect that goes beyond the borders of Puerto Rico and the will of the Puerto Rico people. Because Puerto Rico, like the Virgin Islands, is still a territory, it is a single sovereign with the federal government. The judgment of the Puerto

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[13] Notably, the Petitioner ignores that there are methods—well short of treating it as a single sovereign—for it to vindicate its authority to prosecute violations of Puerto Rico law even when the United States has initiated a similar prosecution. For example, the Virgin Islands recognizes the concept of supplemental criminal jurisdiction when a territorial offense relates to a federal crime, in which the United States Attorney for the District of the Virgin Islands and the Virgin Islands Attorney General jointly prosecute the territorial and federal charges in the District Court of the Virgin Islands as part of a single proceeding. *United States v. Gillette*, 738 F.3d 63, 70-73 (3d Cir. 2013).

Rico Supreme Court saying as much should be affirmed.

CONCLUSION

Amicus curiae Virgin Islands Bar Association respectfully urges that the judgment of the Supreme Court of Puerto Rico be affirmed.

Respectfully submitted,

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